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RALPH R. MABEY, Chapter 11 Trustee for Cajun Electric Power Cooperative, Inc., AMERICAN COMMERCIAL TERMINALS LLC, WESTERN FUELS ASSOCIATION, INC. and TRITON COAL COMPANY LLC,

Petitioners,

vs.

SOUTHWESTERN ELECTRIC POWER COMPANY and THE COMMITTEE OF CERTAIN MEMBERS OF CAJUN ELECTRIC POWER COOPERATIVE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's decision in *United States v. Knight*, 336 U.S. 505 (1949) prohibits one of three competing bidders, proposing one of three competing plans of reorganization, from making direct payments to major stakeholders in the case, who are creditors, equity holders, and contractually bound customers of the debtor, "outside" of and prior to a confirmed plan of reorganization when such payments were made to assist the bidder to acquire the assets of a debtor in a Chapter 11 case?

2. Whether the lower court erred in concluding, contrary to this Court's decision in *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988), that these payments were not subject to the absolute priority rule, 11 U.S.C. § 1129(b), because they were not deemed to be "on account of" the claims or interests of the stakeholders even though the payments were made only "because of" or "by reason of" the stakeholders' claims and equity interests in the bankruptcy case?

In the event that certiorari is granted as to the above questions, in accordance with Rule 14.1(a), Supreme Court Rules, Petitioners also seek to argue the following question 3, but do not include question 3 among the reasons for the grant of certiorari:

3. Whether, consistent with the Fourth Circuit's decision in *In re A.H. Robins Co.*, 832 F.2d 299, 302 (4th Cir. 1987), *cert. denied*, 485 U.S. 962 (1988), stakeholders in a bankruptcy case, who are creditors, equity holders, and contractually bound customers of the debtor, are prohibited from receiving "payment in part or in full" or from receiving "the advance of monies to or for [their] benefit" from one of three competing bidders prior to the approval of the plan of reorganization accepting that bidder's bid and approving the proposed distributions to all stakeholders in the bankruptcy case?

LIST OF PARTIES AND CORPORATE AFFILIATES

Petitioner Ralph R. Mabey is the Chapter 11 Trustee for Cajun Electric Power Cooperative, Inc. Cajun Electric Power Cooperative, Inc. is a generation and transmission electric cooperative owned by its constituent member cooperatives. There are no nonwholly owned subsidiaries of Cajun Electric Power Cooperative, Inc.

Petitioner American Commercial Terminals LLC is a wholly-owned subsidiary of American Commercial Lines LLC, which is a wholly-owned subsidiary of American Commercial Lines Holdings LLC. American Commercial Terminals LLC was formerly known as American Commercial Terminals, a Division of American Commercial Marine Service Company. There are no nonwholly owned subsidiaries of American Commercial Terminals LLC.

Petitioner Triton Coal Company LLC is a wholly-owned subsidiary of Vulcan Coal Intermediary L.L.C., which is a wholly-owned subsidiary of Vulcan Coal Holding L.L.C. Triton Coal Company LLC was formerly known as Triton Coal Company and was previously a wholly-owned subsidiary of Ziegler Coal Holding Company. There are no nonwholly owned subsidiaries of Triton Coal Company LLC.

Petitioner Western Fuels Association, Inc. is a cooperative owned by its constituent member cooperatives. Western Fuels-Wyoming, Inc. is the only nonwholly owned subsidiary of Western Fuels Association, Inc.

The following parties were Appellees at the Fifth Circuit, have not joined in this Petition, and are therefore Respondents: the United States of America, on behalf of the Rural Utilities Service, an agency of the Department of Agriculture; Enron Capital & Trade Resources Corp.; and Louisiana Generating LLC.

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OPINIONS BELOW

The August 11, 1998 opinion of the court of appeals (App. A) is reported at 150 F.3d 503. The October 29, 1998 order of the court of appeals denying Motions for Rehearing and Suggestions for Rehearing En Banc (App. F) is unreported. The opinion of the district court (App. C) and order (App. B) are unreported. The opinion of the bankruptcy court (App. E) and order (App. D) are unreported.

STATEMENT OF JURISDICTION

The court of appeals denied the petitioners' and *other* appellee's motions for rehearing and suggestions for rehearing en banc on October 29, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves consideration of the confirmation and distribution requirements set forth in Sections 1123 and 1129 of the Bankruptcy Code, 11 U.S.C. §§ 1123 and 1129, and the relevant portions of Section 363 of the Bankruptcy Code, 11 U.S.C. § 363, governing sales of assets. Pursuant to Rule 21.1(f), Supreme Court Rules, the text of these provisions is set forth in the appendix hereto (App. G).

STATEMENT OF THE CASE

A. Nature of the Case.

This case involves important questions of bankruptcy law concerning pre-confirmation payments totaling $1,000,000 (the "$1 Million Payment") made, initially secretly, by one of three competing bidders (Southwestern Electric Power Company or "SWEPCO") to certain of Cajun's members (the Committee of Certain Members, "Certain Members Committee" or, individually, the "Certain Members"), whose support was essential to the success of SWEPCO's bid. The Certain Members are seven of the eleven equity holders of Cajun. They are also creditors and contractually bound customers of Cajun.

In making the $1 Million Payment in connection with its bid, SWEPCO bypassed the court-approved and statutorily mandated process for sales of estate assets and for distributing sale proceeds to creditors and other stakeholders in a bankruptcy case, and ignored this Court's decision in *United States v. Knight*, 336 U.S. 505 (1949) regulating the conduct of bidders for estate assets in bankruptcy cases. In accepting the $1 Million Payment, the Certain Members, in contravention of this Court's decision in *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988), received money on account of their junior interests while billions of dollars in senior unsecured claims will receive only cents on the dollar if the plan jointly sponsored by SWEPCO and the Certain Members Committee is confirmed.

The precedent established by the lower court in this case will: (1) permit competing bidders for estate assets to pay cash directly to important stakeholders in a bankruptcy case rather than to the estate; (2) encourage stakeholders to extract additional payments from bidders in violation of the priority and distribution scheme of the Bankruptcy Code; and (3) permit payments to junior interests outside of a plan so long as those payments are characterized as not being "on account of" a claim or interest.

B. Prior Proceedings.

Petitioners objected to the $1 Million Payment. SWEPCO and the Certain Members claimed that because the $1 Million Payment: (i) was made from SWEPCO's "own assets" and "outside" their plan of reorganization; and (ii) was not "on account of" the Certain Members' claims or interests, the payment did not require compliance with the provisions of the Bankruptcy Code.

Petitioners argued that, under this Court's controlling precedents, the payment was subject to the constraints of the Bankruptcy Code, and could only be made as part of SWEPCO's bid to acquire estate assets.

The bankruptcy court ruled in favor of SWEPCO and the Certain Members, concluding the payments were permissible as "transition assistance," a term with no defined or generally accepted meaning in the Bankruptcy Code.[1] While so ruling, the bankruptcy court found that the $1 Million Payment was made to assist SWEPCO's bid: (i) "the payment was made to assist the members in their ongoing struggle for confirmation of the SWEPCO and Members plan;" (App. E at 86a) (ii) SWEPCO "anticipated that the money would not be used in order to benefit either of the competing plans . . . but would, in some way, further SWEPCO's chances of success;" (App. E at

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1. "Transition assistance" is merely the nomenclature adopted by Respondents to support their claim that the genesis of the $1 Million Payment was the Certain Members' "need" for assistance to "transition" to new counsel after the Bankruptcy Court disqualified their prior counsel for a conflict of interest. Despite this nomenclature, however, the district court noted (App. C at 64a) that SWEPCO placed no restrictions on the use of the $1,000,000 by the Certain Members, nor was the amount of the payment correlated to any ascertained amount "needed" by the Certain Members for "transition."

86a) and (iii) "[t]he transition assistance payment is for services and costs in connection with or incident to the case. . . ." (App. E at 88a).

After a thorough review of the record, the district court reversed, determining that the pre-confirmation $1 Million Payment to the Certain Members was unambiguously impermissible under the Bankruptcy Code, and, as such, rendered the plan sponsored by SWEPCO and the Certain Members Committee not confirmable pursuant to 11 U.S.C. §§ 1129(a)(1), (2), (3) and (4) and 1129(b). (App. C at 71a-74a) The district court concluded:

> The intent of the bankruptcy law is that everybody be treated equally. And in this particular case the people that SWEPCO paid had a particular unique position in this particular case. They may have been proponents of a plan, but they had equity standing and, in addition, they were creditors. . . [T]he amount of money that they received in this case, which coincidentally comes to approximately the amount of money that they had as creditors in this particular case, seems to give these people an advantage that other people did not have.

(App. C at 68a-69a).

The Fifth Circuit reversed the district court, rendering its decision after an expedited hearing and briefing schedule, but failed to address Petitioners' primary arguments on appeal. The Fifth Circuit concluded that, because SWEPCO paid the $1 Million Payment directly to the Certain Members and because it was paid for "transition assistance," it did not become part of the estate nor was it paid "on account of" the Certain Members' claims or equity interests. The Fifth Circuit's decision did not discuss this Court's decision in *United States v. Knight* or this Court's precedents concerning the absolute priority rule, 11 U.S.C. § 1129(b).

C. History of the Case.

Cajun is a generation and transmission electric power cooperative owned by its member cooperatives, which are Cajun's equity holders. The member cooperatives are distribution cooperatives which buy all of their power from Cajun, pursuant to all-requirements contracts, and distribute that power to individual users. The all-requirements contracts represent the contractually bound customer base of Cajun, and, as such, they are probably the most valuable assets of the estate. These contracts constitute the primary security for the repayment of the billions of dollars Cajun borrowed from the Rural Utilities Service, an agency of the Department of Agriculture.

Cajun's Chapter 11 case was commenced in the United States Bankruptcy Court for the Middle District of Louisiana on December 21, 1994, and involves claims which may exceed $5.2 billion, $4.2 billion of which is owed to the federal government (the Rural Utilities Service). Another $1 billion in claims is asserted by Petitioners American Commercial, Triton, and Western Fuels, and by the Burlington Northern and Santa Fe Railway Company ("Burlington Northern"). The Certain Members hold approximately $616,000 in allowed unsecured claims. The other unsecured creditors hold some $7 million in claims.

On August 23, 1995, the district court, which had withdrawn the reference of Cajun's bankruptcy case under 28 U.S.C. § 157(d), ordered and approved the appointment of a Chapter 11 trustee. *In re Cajun Elec. Power Coop., Inc.*, 191 B.R. 659, 661-663 (M.D. La. 1995), *aff'd*, 74 F.3d 599 (5th Cir.), *cert. denied*, 519 U.S. 808 (1996). In appointing a trustee, and effectively ousting the members from control of Cajun, the district court noted the clear conflict of interest between the members' desire, as equity holders and

customers, to purchase power from Cajun at the *lowest* possible rate (which reduces the value of the utility) and their duties as Cajun's owners and directors to maximize assets for the benefit of creditors.

In January 1996, the Trustee filed a motion for approval of procedures for the sale of Cajun's assets. After notice and a hearing, the district court approved an auction process designed to maximize the value of the estate's assets. The district court ordered the Trustee to solicit bids for Cajun's assets, select a lead bid, and file a plan of reorganization incorporating the lead bid.

The Trustee filed a plan of reorganization (the "Trustee's Plan") proposing the acquisition of Cajun's assets by Louisiana Generating LLC ("Generating"), the "lead bidder" selected by the Trustee. The Generating bid, currently at a purchase price of $1.188 billion, has offered, since its inception, significantly more value to creditors (now over $200 million more than the current SWEPCO bid).[2] In accordance with the district court's auction procedures, two of the losing bidders filed their own plans sponsoring their own bids for Cajun's assets: (1) SWEPCO proposed a plan jointly with the Members Committee (the "SWEPCO/Certain Members Committee Plan")[3]; and (2) Enron

2. While offering a significantly greater recovery to creditors, according to the rate expert of the Louisiana Public Service Commission, the rates to Cajun's customers (including the Certain Members) under the Trustee's Plan are reasonable, are now virtually indistinguishable from the rates offered under the SWEPCO/Certain Members Committee Plan, and represent substantial reductions from pre-bankruptcy rates.

3. The Members Committee was the predecessor to the Certain Members Committee and was comprised of 10 of Cajun's members. The original SWEPCO bid incorporated in the plan jointly sponsored by SWEPCO and the Members Committee offered the lowest starting rate to the members and correspondingly offered a significantly lower purchase price for the estate's assets — and therefore a significantly lower return to the estate's creditors — than the original Generating bid.

Capital & Trade Resource Corp. ("Enron") proposed a plan jointly with the Official Unsecured Creditors' Committee.[4] The Trustee's Plan and the SWEPCO/Certain Members Committee Plan are currently pending before the bankruptcy court awaiting a decision on confirmation.

During the confirmation hearing, in early January 1997, SWEPCO and the Certain Members signed an agreement, prominently marked "confidential," providing for the $1 Million Payment from SWEPCO directly to the Certain Members. No parties in the case, other than SWEPCO and the Certain Members, had any knowledge of the agreement or of the payment of the $1,000,000 until April of 1997 when one of the Certain Members inadvertently leaked the fact of the $1 Million Payment to a Cajun member not on the Certain Members Committee, who immediately disclosed it to other parties in the case.

Because of their status as important customers, creditors, and equity holders, the members were vigorously courted by all three bidders. As part of that effort, each of the three competing plans proposed some form of reimbursement of certain of the members' expenses. In rendering its decision, however, the Fifth Circuit failed to differentiate between SWEPCO's expense reimbursement, on the one hand, and the expense reimbursement incorporated in plans proposed by the Trustee (and Enron prior to its withdrawal) on the other. The Trustee and the Enron proposals contemplated that before reimbursement payments could be made to members, a confirmed plan of reorganization was required, which would occur only after full disclosure and compliance with all confirmation requirements, including the absolute priority rule and required

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4. Enron and Generating participated with Petitioners in opposing the $1 Million Payment through the decision at the Fifth Circuit. When the Fifth Circuit ruled adversely to Petitioners, Enron withdrew its plan.

equal treatment of claims classified together. The Trustee's Plan will satisfy these requirements.[5] SWEPCO, in contrast, secretly made the $1 Million Payment pre-confirmation to its supporters.[6]

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision changes established bankruptcy law by condoning secret pre-confirmation payments by a competing bidder directly to crucial stakeholders in a bankruptcy case.

The district court judge, who established the auction process and who had carefully and personally reviewed the record, found the $1 Million Payment "legally, morally and ethically wrong" and referred the matter to the United States Attorney for investigation.[7] (App. C at 52a).

The Fifth Circuit's decision permitting this conduct is irreconcilable with *United States v. Knight*, *supra*, and *Norwest*

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5. The Trustee's Plan incorporates a complete creditor consensus in the case, either through settlements or by paying creditors' claims in full (with the consent of creditors not receiving full payment), and a partial consensus with Cajun's members, not on the Certain Members Committee, representing approximately 30% of the contractually bound customer load.

6. The Trustee, Rural Utilities Service, American Commercial, Triton, Western Fuels, and Burlington Northern had all filed objections to the SWEPCO/Certain Members Committee Plan in November of 1996, prior to the time the $1 Million Payment was made, including objections to any payments to the members because such payments violated 11 U.S.C. §§ 1123(a)(4) (equal treatment of claims and interest classified together) and 1129(b) (absolute priority rule).

7. As the district court noted, the attorney for the Rural Utilities Service had previously made a referral to the U.S. Attorney's Office when the payment was first discovered three months after the fact.

Bank Worthington v. Ahlers, *supra*. It announces a sea change in bankruptcy law, undermining established rules of law protecting creditors[8] and reopening the door for abusive practices condemned by this Court in *Knight*. As explained by Mr. Justice Douglas in *United States v. Knight*, the Court granted the petition for certiorari in that case "because of the importance of the ruling in the administration of the Bankruptcy Act." 336 U.S. at 508. The ruling in this case is of equal importance to the administration of the Bankruptcy Code, the successor to the Act.

Further, the Fifth Circuit's decision raises important issues now before the Court in *Bank of Am. Nat'l. Trust and Sav. Ass'n v. 203 North LaSalle St. Partnership*, 126 F.3d 955 (7th Cir. 1997), *cert. granted*, 118 S. Ct. 1674 (May 4, 1998) (No. 97-1418). To the extent the Court reverses or limits the Seventh Circuit's ruling in *LaSalle*, this case should be decided consistently with *LaSalle*.

For all of theses reasons, this Court should grant the petition for a writ of certiorari and reverse the Fifth Circuit's decision.

A. The Fifth Circuit's Ruling is Contrary to This Court's Decision in *United States v. Knight* Prohibiting Direct Payments by Bidders.

The Fifth Circuit ignored this Court's decision in *United States v. Knight*, *supra*, that a bidder cannot offer to buy assets of the estate and, in pursuit of that bid, pay funds directly to important stakeholders, rather than to the estate. Here,

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8. Maximizing asset values for creditors' benefit and promoting equal distributions among creditors are two primary policies underlying the bankruptcy laws. *See, e.g.*, *Begier v. Internal Revenue Service*, 496 U.S. 53, 58 (1990) (equality of distribution among creditors); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985) (maximizing the value of the estate).

SWEPCO unquestionably *made* the $1 Million Payment in connection with its efforts to acquire estate assets, and the Certain Members unquestionably *received* the $1 Million Payment only because they are important stakeholders with leverage in this bankruptcy case.

Based on the bankruptcy court's finding that SWEPCO's "own" corporate funds were the source of the $1 Million Payment, and that the district court ordered the $1,000,000 returned to SWEPCO[9], the Fifth Circuit accepted the bankruptcy court's conclusion that the $1 Million Payment did not constitute property of the estate, and was not property subject to the priority and distribution provisions of the Bankruptcy Code. (App. A) Of course, all of the monies paid by *any* bidder to acquire assets of the estate are from the bidder's "own" corporate funds. The "source" of the funds is not determinative. Rather, the undisputed fact that SWEPCO, to advance its bid, made payments directly to seven of Cajun's eleven members, as crucial stakeholders, brings this case squarely within this Court's reasoning in *United States v. Knight*, *supra*, where, in an analogous situation, this Court rejected arguments similar to those embraced by the Fifth Circuit here.

In *United States v. Knight*, the Court upheld the criminal conviction of a bidder's attorney in a reorganization case where the bidder paid money directly to a trustee, rather than to the estate, in connection with its purchase of estate assets. The government argued that the funds paid were "part of the bankruptcy estate." 336 U.S. at 506. The bidder defended the payments as being "gifts" from the bidder's own assets and for fee and expense reimbursement. 336 U.S. at 506. In rejecting these arguments, the *Knight* Court held:

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9. Since the Fifth Circuit's ruling, SWEPCO has again paid the $1,000,000 to the Certain Members.

> All the consideration which is paid for a bankrupt's assets becomes part of the estate. No device or arrangement, however subtle, can subtract or divert any of it. It is the substance of the transaction, not its form, which controls. If that requirement were not rigidly enforced, control of the plan of reorganization and control of allowances would pass from the court to the parties. That would subvert the statutory scheme.

336 U.S. at 508-09. The Court's conclusion relied on two fundamental bankruptcy policies: (1) ensuring equitable distribution to creditors; and (2) controlling the plan of reorganization process.

Knight compels the conclusion that if SWEPCO paid *anything* to the Certain Members because of their status as stakeholders in the bankruptcy case, and if the payment was made in connection with SWEPCO's efforts to acquire estate assets, the funds must be regarded as part of the estate. The $1,000,000 could be paid, *if at all*, only pursuant to a confirmed plan of reorganization approving SWEPCO's bid. Consistent with *Knight*, since the $1 million payment was "in fact paid," *id.* at 508, and "was paid in connection with the reorganization," *id.*, as was clearly found by the bankruptcy court, the legal conclusion that must be reached is that the $1 million payment must be considered "part of the estate," *id.*, which can only be distributed in accordance with the Bankruptcy Code's requirements.

Knight further cautioned that, unless prohibitions against a bidder making direct payments to stakeholders are "rigidly enforced," control of the plan process, the auction, sales of estate property, and of creditor distributions passes out of the court and vests in third parties. *Id.* By disregarding *Knight*, the

decision of the Fifth Circuit yields an unmanageable process inimical to the carefully crafted statutory scheme for ensuring equitable distribution to creditors, maximizing estate assets, and court control of the reorganization process.[10] If stakeholders are free to accept money directly from a bidder seeking to acquire estate assets "outside" of the Bankruptcy Code's mandated distribution scheme, then the bidder and the recipient stakeholders could bypass numerous statutory requirements (including Sections 361, 363, 365, 502, 507, 510, 541, 1122, 1123, 1125, 1126, 1128, and 1129 of the Bankruptcy Code) and radically change the "conscious allocation of reorganization benefits and losses" that Congress established among stakeholders in a chapter 11 case. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988).

The Fifth Circuit's opinion opens the door for unscrupulous bidders to "syphon away funds that otherwise would have gone to the estate," *id.* at 508, and direct them only to those

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10. The policies stated in *Knight* are given effect in Title 11 which establishes a comprehensive distribution scheme and court control of the bid process. Congress has reinforced this civil statutory scheme with criminal penalties. *See e.g.* 18 U.S.C. § 152(6) (it is a criminal offense for any "person who . . . knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11. . . ."). These criminal penalties are:

> a congressional attempt to cover all of the possible methods of which a debtor *or any other person* may attempt to defeat the intent and effect of the bankruptcy law through any type of effort to keep assets from being equitably distributed among creditors.

United States v. Goodstein, 883 F.2d 1362, 1369 (7th Cir. 1989) (citing *Stegeman v. United States*, 425 F.2d 984, 986 (9th Cir. 1970) and 2A *Collier on Bankruptcy* § 29.04[2] (14th ed. 1982)) (emphasis added).

stakeholders with the leverage to bargain for an increased share of the bankruptcy pie "outside" of the court-approved bidding process and the confirmation and distribution provisions of the Bankruptcy Code. These far-reaching consequences of the Fifth Circuit's decision on the implementation of the Bankruptcy Code provide compelling reasons for this Court to grant Petitioners' writ of certiorari.

B. The Fifth Circuit's Decision Contravenes This Court's Precedent on the Absolute Priority Rule.

The Fifth Circuit's decision also significantly erodes the "absolute priority rule" of Section 1129(b).[11] Because the bankruptcy court had found the $1 Million Payment was "transition assistance," the Fifth Circuit concluded that the $1 Million Payment was not "on account of" the Certain Members' claims or interests and therefore did not implicate or violate the absolute priority rule. (App. A at 34a) Engaging in this wordplay, however, contravenes this Court's decision in *Norwest Bank Worthington v. Ahlers*, *supra*. This Court rejected arguments that the property "received or retained" by equity on account of future labor was not "on account of such junior claim or interest," and found such distributions violated the absolute priority rule. The Court held that the absolute priority rule must be strictly observed and enforced, cautioning that *any* judicial modification of the absolute priority rule — even a minor one — invites its erosion and cannot be countenanced. *Ahlers*, 485 U.S. at 202-06.[12]

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11. The absolute priority rule provides that, absent their consent, until senior creditors are paid in full, junior claimants or interest holders may not receive or retain any property "on account of" their junior claim against or interest in the debtor. In this case, the $1 Million Payment is more than enough to pay all allowed unsecured claims of the Certain Members in full plus allowing for a distribution on their junior equity interests as well — while other, non-consenting, creditors remain unsatisfied if the SWEPCO/ Certain Members Committee Plan is confirmed.

12. The prophetic nature of this warning is evident as a result of the Fifth Circuit's sanctioning of a "transition assistance" exception. (Cont'd)

In *Bank of Am. Nat'l. Trust and Sav. Ass'n. v. 203 North LaSalle St. Partnership*, 126 F.3d 955 (7th Cir. 1997), *cert. granted*, 118 S. Ct. 1674 (1998) (No. 97-1418), the Court recently received briefs and heard arguments on the issue of whether a "new value exception" was retained as part of the absolute priority rule codified in 11 U.S.C. § 1129(b). Central to the analysis of an "exception" to the absolute priority rule is a determination of when a junior creditor or equity holder retains or receives property "on account of" a claim or interest.

Similar to the Seventh Circuit's decision in *LaSalle*, the Fifth Circuit in this case accepted the argument that "on account of" applies only if the junior claim or interest is the exclusive or sole cause for the property being received. Rewriting the plain language of 11 U.S.C. § 1129(b) by adding such a modifier: (i) violates established rules of statutory construction; (ii) is a departure from the common understanding of the phrase "on account of," which is "for," "because of," and "by reason of;" and (iii) is inconsistent with the context in which this phrase is used throughout the Bankruptcy Code.[13] No one can

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(Cont'd)

The Fifth Circuit's ruling has already been cited by the Respondent in *Bank of Am. Nat'l. Trust and Sav. Ass'n. v. 203 North LaSalle St. Partnership* pending before this Court to justify the retention by equity holders of property in that case. Supplemental Brief of Respondent, 1997 U.S. Briefs 1418, *1 (October 15, 1998). The Fifth Circuit's ruling has also been cited in another appeal currently pending before the Fifth Circuit in this case to justify a claim for the diversion of millions of dollars of estate funds to the member equity holders of Cajun. Brief of Appellant Louisiana Public Service Commission at 27 and 46, *Louisiana Public Service Comm'n v. Ralph R. Mabey, Chapter 11 Trustee for Cajun Elec. Power Coop., Inc.* (No. 98-31258).

13. *See* Brief for the United States as Amicus Curiae Supporting Petitioner in *Bank of Am. Nat'l. Trust and Savings Ass'n v. 203 North LaSalle St. Partnership*, 1997 U.S. Briefs 1418, *11 and *13 (June 26, 1998).

reasonably dispute that SWEPCO offered and the Certain Members received the $1 Million Payment "because of" and "by reason of" the Certain Members' claims against and interests in Cajun and that they accepted it, notwithstanding the existence of a senior dissenting class. But for the Certain Members' status as critical stakeholders in the bankruptcy case, SWEPCO never would have made the $1 Million Payment.

Unlike *LaSalle*, equity holders in this case (the Certain Members) are not contributing any new capital or value to the reorganization effort.[14] The Certain Members have leveraged their status as strategic stakeholders in this bankruptcy case into distributions of property ahead of senior creditors. It is this type of abuse that the absolute priority rule was designed to prevent.

That the $1 Million Payment was made prior to the SWEPCO/Certain Members Committee Plan being confirmed, but at a time when the senior class of unsecured creditors had already voted to reject the SWEPCO/Certain Members Committee Plan, only makes this abuse of the absolute priority rule more egregious.

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14. The Certain Members are not partners or participants with SWEPCO in seeking to acquire assets of the estate. Their alliance with SWEPCO, and their co-sponsorship of a plan with SWEPCO, arises solely by virtue of their status as important stakeholders in this case. The $1 Million Payment was not a purchase of their claims by SWEPCO, nor was it paid in settlement of any claims or disputes existing between SWEPCO and the Certain Members.

CONCLUSION

The Fifth Circuit's decision significantly impinges on creditor protections in bankruptcy and erodes bedrock bankruptcy rules of law. Under the Fifth Circuit's ruling, bankruptcy courts will no longer be the gatekeepers of the process, but only the scorekeepers of a game whose rules are defined by any player whose pocketbook allows it to save money or to fix the game in its favor by making direct payments to important stakeholders and not to the estate. The writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED AUGUST 11, 1998

UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

No. 98-30683

In the Matter of: CAJUN ELECTRIC POWER COOPERATIVE, INCORPORATED,

Debtor.

Ralph R. MABEY, Chapter 11 Trustee for Cajun Electric Power Cooperative, Inc.; LOUISIANA GENERATING LLC; TRITON COAL COMPANY; WESTERN FUELS ASSOCIATION, INC.; ENRON CAPITAL AND TRADING RESOURCES INC.; AMERICAN COMMERCIAL MARINE SERVICE COMPANY; UNITED STATES OF AMERICA; RURAL UTILITIES SERVICE,

Appellees,

v.

SOUTHWESTERN ELECTRIC POWER COMPANY; THE COMMITTEE OF CERTAIN MEMBERS OF CAJUN ELECTRIC POWER COOPERATIVE,

Appellants.

Appeal from the United States District Court for the Middle District of Louisiana

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Before KING, SMITH and PARKER, Circuit Judges.

KING, Circuit Judge:

Appellants Southwestern Electric Power Company and the Committee of Certain Members of Cajun Electric Power Cooperative, Inc. appeal the district court's order reversing the bankruptcy court's denial of a motion of appellee Ralph R. Mabey, Chapter 11 trustee of Cajun Electric Power Cooperative, Inc., seeking the disgorgement of certain payments made by Southwestern Electric Power Company to the Committee of Certain Members and a declaration that these payments rendered the plan of reorganization proposed by the appellants unconfirmable as a matter of law. For the reasons set forth below, we reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Overview of the Bankruptcy and Proposed Plans

Cajun Electric Power Cooperative, Inc. (Cajun) is a non-profit rural electrical power cooperative that filed a petition seeking reorganization under Chapter 11 of the Bankruptcy Code on December 21, 1994. The Cajun case is a mega-case with more than $5 billion in debt and over seven hundred creditors. Cajun has twelve members, all of which are electric distribution cooperatives serving retail customers in the State of Louisiana. After extensive litigation regarding the propriety of the appointment of a bankruptcy trustee, this court approved the district court's appointment of Ralph R. Mabey (the Trustee) as Cajun's Chapter 11 trustee. *See Cajun Elec. Power Coop., Inc. v. Central La. Elec. Coop., Inc. (In re Cajun Elec. Power Coop., Inc.)*, 74 F.3d 599 (5th Cir.1996).

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With the approval of the bankruptcy court, the Trustee conducted a remarkably fruitful "auction" that led to the submission of three competing plans of reorganization: one proposed by the Trustee, incorporating an offer to purchase Cajun's non-nuclear assets by Louisiana Generating LLC (Generating)[1]; another proposed by Enron Capital & Trade Resources Corp. (Enron) and the Official Committee of Unsecured Creditors; and another proposed by Southwestern Electric Power Company (SWEPCO) and the Committee of Certain Members (CCM), an unofficial committee which initially included ten of Cajun's twelve member cooperatives. We refer to these plans as the Trustee's Plan, the Enron Plan, and the SWEPCO Plan, respectively.

Each of the three plans before the bankruptcy court requires the sale of Cajun's non-nuclear assets to one of the respective proponent-bidders and the continued retention of Cajun's members as customers. The Trustee's Plan and the Enron Plan propose to retain Cajun's members as customers through assumption of the existing power-supply agreements between the members and Cajun (the All-Requirements Contracts) pursuant to 11 U.S.C. § 365. The SWEPCO Plan proposes to retain Cajun's members as customers through voluntarily negotiated new power-supply agreements. Significant for this appeal, all three of the plans also provide for reimbursement of certain of the members' expenses in connection with the bankruptcy case.

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1. Generating is jointly owned by Zenergy, Inc.; NRG Energy, Inc.; and Southern Energy-Cajun, Inc. Zenergy, Inc. is a wholly-owned subsidiary of Zeigler Coal Holding Company, which is also the parent of Triton Coal Company, one of Cajun's major creditors and suppliers.

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B. Payments by SWEPCO to the CCM

Sometime prior to November 12, 1996, the date that the bankruptcy court approved all disclosure statements of the plan proponents, SWEPCO offered to pay certain legal fees of the CCM in connection with pursuing the SWEPCO Plan and in connection with an adversary proceeding initiated by the CCM in which it sought a declaration that the All-Requirements Contracts are void or assignable only to a party of the CCM members' choosing. This offer is evidenced by a memorandum written by David Kleiman, who at the time was the CCM's attorney, to the CCM members, which provides as follows:

> I previously advised you that SWEPCO had offered to subvent certain expenses of the Members Committee. Attached is their formal proposal to do so. The only condition is that the members will reimburse SWEPCO if we support another Plan. This seems fair. If we decide to support another Plan, we can negotiate for that Plan proponent to reimburse our expenses. Please indicate your acceptance or rejection of this proposal.

Attached to the memorandum was an unsigned draft letter from SWEPCO's counsel dated November 12, 1996, stating the following:

> . . . [T]he Members Committee (hereinafter referred to as "Members") and SWEPCO have mutual and joint interests in pursuing the Joint Plan of Reorganization and Members' adversary proceeding. The pertinent contract issues . . . will be prominent issues throughout the confirmation

process. Based upon the significance of these legal issues to our Joint Plan and in light of the substantial costs continuing to accrue as a result of the Members pursuing these legal issues, SWEPCO is prepared to assist the Members by subvention of certain costs associated with these efforts. The following is a suggested approach, subject to our joint approval.

First, SWEPCO has previously offered to reimburse the Members for expenses in the reorganization of up to $1 million, payable solely in the event our Plan of Reorganization is successful. This offer remains in force and effect.

On a monthly basis, SWEPCO also offers to pay the percentage set forth below of specified reasonable fees and expenses incurred by the Members Committee in connection with the confirmation and adversary proceeding. SWEPCO suggests that the payment be limited to 50% of the reasonable expenses of [the CCM's legal fees incurred beginning in September 1996]. In addition to these costs and expenses, SWEPCO would agree to pay for any expert witnesses jointly approved in advance. The Members may retain any expert they desire, at the Members' expense.

This agreement recognizes that the Joint Plan is in the best interest of the Members, SWEPCO and the ratepayers and the purpose of this agreement is to jointly support our Plan of Reorganization. In the event the Members abandon the exclusive support of the Joint SWEPCO/Members[ ] Plan, then the

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> Members will reimburse SWEPCO all of said costs paid by SWEPCO pursuant to our agreement within 30 days of written notice from SWEPCO. SWEPCO's commitment may be terminated in SWEPCO's sole discretion by SWEPCO providing the Members written notice and SWEPCO's obligation to pay shall continue up to the date of written notice. The Members have no reimbursement obligation in the event of termination by SWEPCO, other than the obligation to reimburse SWEPCO in the event of abandonment of the exclusive support of the Members/SWEPCO[ ] Plan.

The record does not reflect that any of the CCM members accepted this offer.

On November 12, 1996, the bankruptcy court approved a master disclosure statement drafted by the Trustee discussing Cajun and the reorganization in general as well as a supplemental disclosure statement from each plan proponent. SWEPCO's supplemental disclosure statement contains a section styled "Summary of Transactions to Occur Outside the Plan," which provides in pertinent part as follows:

> In addition, SWEPCO and the Members have agreed that, in the event the Plan is confirmed and consummated, as soon as practicable after the closing of the transaction whereby [SWEPCO's affiliate] acquires the Acquired Assets, SWEPCO shall reimburse the Members that are constituents of the Members' Committee for their reasonable attorneys fees and expenses incurred in this bankruptcy proceeding, not to exceed $1 million in

the aggregate. In addition, SWEPCO may agree to pay certain expenses of the Members Committee in regard to certain litigation and the plan confirmation process.

By the December 6, 1996 voting deadline, the CCM members had voted overwhelmingly for the SWEPCO Plan and the Enron Plan and overwhelmingly against the Trustee's Plan. The vast majority of the CCM members listed the SWEPCO Plan as their first preference and the Enron Plan as their second preference; the Trustee's Plan received no preferential support from the CCM members. Confirmation hearings before the bankruptcy court began on December 16, 1996. That week, Southwest Louisiana Electric Membership Corporation (SLEMCO) and Pointe Coupee Electric Membership Corporation (Pointe Coupee), two members of the CCM, announced in open court that they wished to withdraw their support of the SWEPCO Plan and to change their vote and preference to the Trustee's Plan. Concordia Electric Cooperative, Inc., another CCM member, shortly followed suit. Thereafter, the CCM was reconstituted to include only seven members.

On January 2, 1997, SLEMCO filed a motion to disqualify David Kleiman and his law firm, which had represented the CCM members throughout the bankruptcy, because of a conflict of interest based upon Kleiman's prior representation of SLEMCO. On January 7, 1997, the bankruptcy court granted SLEMCO's motion.

On the evening of January 7, 1997, SWEPCO's president, Mike Smith, met with the CCM members who had not withdrawn support for the SWEPCO Plan and offered to pay

them $1 million in two $500,000 installments, one of which was payable immediately. The terms of the payments were set forth in a letter dated January 9, 1997 from SWEPCO's counsel to David Kleiman that provided in relevant part as follows:

> In light of the action by SLEMCO wherein the Members must now seek other bankruptcy counsel, the Members and the Members' Committee will incur very substantial transition costs. This will not only require that new bankruptcy counsel spend substantial time in reviewing this long-standing and complicated case, but that your firm take all steps necessary for there to be an orderly and effective transition. These additional costs impose an even greater burden on the cooperatives. In order to assist the Members in paying expenses previously incurred in this bankruptcy proceeding and particularly, for expenses to be incurred during the transition, SWEPCO has agreed to pay and/or reimburse the Members $1 million. These funds will be provided in two equal payments with the first payment provided immediately after receipt of the required agreements by the participating cooperatives and the second payment within approximately one month. These funds will be provided to the Members' Committee and the Members' Committees [sic] will distribute the funds as determined appropriate by the Committee.
>
> One other proponent has offered to reimburse each of the Member cooperatives expenses. In the event any Member supports another plan or receives reimbursement from any other proponent, then the

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Member cooperative agrees to promptly reimburse SWEPCO for the respective expenses paid by SWEPCO and received by such Member. The cooperative also agrees to use its best efforts to obtain reimbursement from any other proponent, in the event the said cooperative elects to endorse another plan.

SWEPCO acknowledges and agrees that the Members and SWEPCO must and will continue to act in the best interest of their respective ratepayers and Members. We recognize the ongoing financial pressure that has been applied to the Members, particularly in light of the removal of counsel and the incurrence of transition costs, and this offer is intended to address these concerns and allow the parties to continue to pursue the serious bankruptcy issues.

I would appreciate it if each Member would acknowledge their agreement to the terms and provisions contained herein in writing via separate correspondence. This agreement is confidential and shall not be disclosed to any third parties without the mutual consent of the parties or as required by law.

Some, but not all, of the letters sent out to the CCM members contained a footnote, added at the direction of Kleiman, at the end of the second paragraph quoted above that provided as follows:

> However, in the event of an adverse court ruling such that the SWEPCO/ [ ]Members Committee Plan

> is not selected, but rather a different Plan is selected and that Plan proponent does not reimburse the Members' attorneys' fees and expert fees, the Members will not have to reimburse SWEPCO.

On January 9, 1997, Kleiman also sent a memorandum to the CCM members stating the following:

> You will recall that [SWEPCO] committed to a payment to the seven (7) Members that continue to support SWEPCO in the total sum of $1 million. The only condition is that the Members will use their best efforts to have that amount repaid in the event that they support a different plan proponent at some date in the future.

On January 16, 1997, Kleiman faxed to SWEPCO's counsel the consent forms whereby the CCM members accepted the terms of the January 9, 1997 letter. The consent forms were accompanied by a letter from Kleiman to SWEPCO's counsel stating Kleiman's understanding that the January 9, 1997 letter agreement was to be modified by adding the following text to the end of the paragraph in the letter where Kleiman had previously requested the addition of the footnote discussed above:

> In the event of an adverse court ruling such that the SWEPCO/[ ]Members Committee Plan is not approved by the court, but rather a different plan is approved by the court, and the plan proponent does not reimburse the Members' attorneys fees and expert fees, the Members will have no obligation to reimburse SWEPCO. Likewise, in the event that no

> plan is confirmed, then in such event the Members shall have no obligation to reimburse SWEPCO.

David Shaw, the president of the board of Washington-St. Tammany Electric Cooperative, Inc., one of the remaining CCM members, later informed Jimmy Ewing, Pointe Coupée's president, about the payments. Thereafter, on April 17, 1997, SWEPCO and the CCM filed with the bankruptcy court a "Joint Report on Certain Transition Payments to the Committee of Certain Members" stating that the payments were made to defray certain legal expenses, particularly in light of Kleiman's disqualification, and indicating that the payments were "essentially [an] accelerat[ion]" of the $1 million post-confirmation payment described in SWEPCO's supplemental disclosure statement.

On April 21, 1997, SWEPCO filed with the bankruptcy court term sheets signed by SWEPCO and the CCM members setting out the terms and provisions to be included in a wholesale power-supply agreement between Southwestern Wholesale Electric Company (SWECO), an affiliate of SWEPCO, and the CCM members. Paragraph VI.A of the term sheets provided as follows:

> SWEPCO agrees to support the Joint Member/ SWEPCO Plan, as the same may be modified or amended by mutually agreeable changes that do not alter the Joint Members/SWEPCO Plan in material respects ("Joint Plan"), through the confirmation hearing process and to provide wholesale power to the Members pursuant to the terms and provisions set forth hereinabove upon confirmation and the effective date of the Joint Plan, subject to the terms

> and conditions set forth in the Asset Purchase Agreement and Joint Plan, as long as a majority of the Members (measured by numbers of customers) support the Joint Plan. The members agree to continue to exclusively support the Joint Plan, subject to the Bankruptcy Code and Rules, through the confirmation hearing process and, if the Joint Plan is confirmed, then, at the effective date of the Joint Plan, to enter into a Power Supply Agreement with SWECO, pursuant to the terms and conditions set forth hereinabove, as such terms may be modified or amended, and including other conditions and terms agreed to by the parties. The members may elect to discuss provisions of a wholesale power supply agreement with third parties; however, the Members, subject to the Bankruptcy Code and Rules, shall not agree to enter into a Power Supply Agreement with any other person or persons unless or until an order is issued i) denying confirmation of the Joint Plan; ii) confirming a plan proposed by another plan proponent; or iii) expressly authorizing support of another plan that has been materially amended from its current version.

Additionally, Paragraph V.C of the term sheets set forth the following agreement regarding cost reimbursement:

> SWEPCO and the Members have reached an agreement on certain transitional cost reimbursement provisions as set forth in [the letter of SWEPCO's counsel] to Mr. Kleiman dated January 9, 1997; and this agreement is currently

being implemented. SWEPCO will reimburse the Members fifty (50%) of reasonable bankruptcy counsel litigation expenses (expenses of Altheimer & Gray and Dann, Pecar, Newman & Kleiman) and expert expenses incurred in support of the Joint Plan, on a monthly basis, beginning January 1, 1997. In the event the SWEPCO Plan is confirmed, SWEPCO also agrees to reimburse the cooperatives for reasonable outstanding bankruptcy litigation and expert expenses incurred in support of the Joint Plan up to the total cumulative sum (for all past or future payments) of $5,000,000, which sum may be increased pursuant to mutual agreement.

C. Litigation Regarding the Payments

On April 18, 1997, the Trustee filed a response to the Joint Report and a combined motion and memorandum seeking denial of confirmation of the SWEPCO Plan and/or disgorgement of the payments that SWEPCO made to the CCM. In his motion, the Trustee claimed that SWEPCO's payments to the CCM were not adequately disclosed prior to being made and violated 11 U.S.C. § 1129(a)(4)'s requirement that

> [a]ny payment made . . . by the proponent [of a plan of reorganization] . . . for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, [be] . . . approved by, or subject to the approval of, the court as reasonable.

11 U.S.C. § 1129(a)(4). The Trustee additionally argued that the payments violated § 1129(a)(1), (2), and (3) of the

Bankruptcy Code because they resulted in discrimination amongst creditors and circumvented the "Bankruptcy Code's provision respecting the rights of secured creditors and the priority of payments to creditors established by the Code."

The bankruptcy court conducted a hearing on the Trustee's motion during which it heard six days of testimony from sixteen witnesses and received eighty exhibits into evidence. Representatives of the remaining CCM members, as well as SWEPCO's president, testified that, as they understood the agreement between SWEPCO and the CCM members, the only condition that SWEPCO placed upon the two $500,000 transition payments was that the CCM members would be required to return the funds in the event that another plan was confirmed and they received reimbursement from the proponent of the confirmed plan.

On September 3, 1997, the bankruptcy court issued a detailed oral ruling denying the Trustee's motion. The bankruptcy court made the following findings of fact that are germane to this appeal:

> As early as November 16, 1996, SWEPCO and the committee were conducting negotiations with respect to reimbursement of fees and expenses, which negotiations the Court found within the certain expenses referred to in the second sentence of the disclosure statement. I believe this was of the subject of Mr. Klieman's [sic] memorandum to the Members on that date,[2] which transmitted SWEPCO's offer with respect to fees.

2. The bankruptcy court's reference to the date of this memorandum indicates that it intended to say that SWEPCO and the CCM had been conducting negotiations regarding reimbursement of fees and expenses as early as November 13 rather than 16.

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At the Hilton meeting on January 7, Mr. Smith, SWEPCO's president, for the first time suggested an immediate $1 million payment. He testified that the payment was made to assist the members in their ongoing struggle for confirmation of the SWEPCO and Members plan. The evidence is overwhelming that the $1 million payment, by whatever name you choose to call it, was generally made without strings attached. There is no credible evidence which suggests otherwise. The only requirement was that the funds would be repaid to SWEPCO in the event that the following happened, another plan was confirmed and the Members received reimbursement under the confirmed plan. The members also agreed to use their best effort to negotiate expense reimbursement, as a successful plan proponent.

The question was asked of several witnesses, including Mr. Smith, what did SWEPCO get for their $1 million. The answer was generally uniform, nothing. The Court believes, though, that while there was nothing specific that SWEPCO either asked for or was promised, surely they anticipated that the money would not be used in order to benefit either of the competing plans of Enron or Louisiana Generating, but would, in some way, further SWEPCO's chances of success. I do not find this to be inappropriate. The fact is that SWEPCO was and is a major player in this Chapter 11 case. Mr. Smith was in court when the Dan Pecar firm [Kleiman's firm] was disqualified, and he saw the impact of the decision on the joint confirmation effort of SWEPCO and the Committee. There was no

testimony whatsoever that the payment had been discussed or even contemplated prior to January 7. The Court finds the payment to be as characterized by SWEPCO, and that is a transition assistance payment.

To be sure, allegations of vote buying have surfaced with respect to this payment. At the time the payment was conceived and when it was made, however, the votes were already in. The ballots were filed in early December 1996. Each member had already voted for the SWEPCO plan. As stated earlier in the terms of the letter of Mr. Gilliam [SWEPCO's counsel] of January 9, clearly indicate that the payment did not lock in any of the members. They were free to meet and negotiate. In fact, they did.

A complaint was further made that SWEPCO did not disclose the payment to the Court until the Trustee learned of the payment in early April and forced SWEPCO to make the disclosure. The Court finds that while the negotiations between SWEPCO and the committee were deemed confidential at the time, there was at all times an intent to make disclosure of the payment at an appropriate time. This is clearly borne out by reference to the draft of the term sheet originally dated in February 1997. The Court further concludes that the second sentence in the SWEPCO disclosure statement placed all parties on notice of the possibility of the payment of additional funds may be negotiated. And I do not believe that this second sentence of the disclosure statement should be narrowly construed.

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> In late April 1997, SWEPCO and the committee, the reconstituted committee, caused to be filed with the court a term sheet executed by the parties. There was, in Paragraph 5, language under the phrase "additional terms," additional language with respect to fee and expense reimbursement. And I believe that the inclusion of this language in that agreement was merely the culmination of the months of negotiation between SWEPCO and the committee.
>
> The Trustee and others point to a lock-in which was contained in Paragraph 6 of the term sheet, entitled "Agreement and Obligations of the Parties," requiring Members to exclusively support the joint plan. . . . I do not find, however, that the provisions of Paragraph 6 of the term sheet suggest that any violations or any lock-in has occurred.

The bankruptcy court went on to hold that the payments were subject to § 1129(a)(4) but that § 1129(a)(4) did not require the court's approval of the payments prior to their being made. It therefore ordered SWEPCO and the CCM to file an application "seeking nunc pro tunc approval of the payment[s]." It further ordered SWEPCO to make no further payments to the CCM or its members unless and until the court found the previously made payments reasonable. Pursuant to the bankruptcy court's instructions, on October 2, 1997, SWEPCO and the CCM filed such an application. The bankruptcy court denied the application without prejudice on March 17, 1998. On April 15, 1998, SWEPCO and the CCM filed a renewed application, which remains pending before the bankruptcy court.

The Trustee sought leave of the district court to appeal the bankruptcy court's denial of his motion, and the district court

granted permission to appeal. On appeal, the district court held that the bankruptcy court erred in concluding that (1) SWEPCO's supplemental disclosure statement adequately disclosed its payments to the CCM and (2) the payments were not conditioned upon the CCM's exclusive support of the SWEPCO Plan. On this basis, the district court concluded that the payments violated 11 U.S.C. § 1129(a)(4) because SWEPCO failed to obtain prior approval of the payments from the bankruptcy court and the payments were made to lock in votes, § 1125 because SWEPCO had failed to fully disclose the payments, § 1123(a)(4) because the payments constituted discriminatory treatment of creditors within the same class, § 1129(b)(2)(B) because the payments violated the absolute priority rule, and § 1129(a)(3) because the payments and their concealment were improper and constituted bad faith. The district court therefore ordered "disqualification" of the SWEPCO Plan on the ground that it is unconfirmable as a matter of law[3] and ordered disgorgement of the funds paid by SWEPCO

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3. We presume that, in determining that SWEPCO's purported violation of § 1125 barred confirmation of the SWEPCO Plan, the district court was relying upon either § 1129(a)(1), which provides that a plan may not be confirmed unless "[t]he plan complies with the applicable provisions of [Title 11]," or § 1129(a)(2), which provides that a plan may not be confirmed unless "[t]he proponent of the plan complies with the applicable provisions of [Title 11]." *See Mickey's Enters., Inc. v. Saturday Sales, Inc. (In re Mickey's Enters., Inc.)*, 165 B.R. 188, 193 (Bankr.W.D.Tex.1994) ("In order to confirm a plan the court must find that the plan and its proponent have complied with the applicable provisions of Title 11. One of those applicable provisions is § 1125 which requires disclosure of 'adequate information'." (citations omitted)). We likewise presume that, in determining that SWEPCO's purported violation of § 1123(a)(4) barred confirmation of the SWEPCO Plan, the district court was relying upon § 1129(a)(1). *See* H.R.REP. No. 95-595, at 412 (1977) ("Paragraph (1) [of § 1129(a)] requires that

(Cont'd)

to the CCM members. SWEPCO and the CCM appeal these orders. On July 10, 1998, we stayed the district court's orders. Convinced that prompt confirmation of a plan by the bankruptcy court is of utmost importance to all parties in interest, we expedited this appeal, obtained full briefing, heard extended oral argument by the parties on August 4, and now render our decision.

II. STANDARD OF REVIEW

This case revolves around whether SWEPCO's payments to the CCM violated various provisions of the Bankruptcy Code. Based on a series of findings of fact and conclusions of law, the bankruptcy court decided that they did not. In holding that the bankruptcy court erred in so deciding, the district court made a series of legal conclusions which we review de novo. In addition, the district court, either explicitly or implicitly, determined that certain of the bankruptcy court's fact-findings were clearly erroneous. The district court's determination that certain fact-findings of the bankruptcy court were clearly erroneous itself constitutes a conclusion of law which we also review de novo. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 577-78 (1985); *In re Sublett*, 895 F.2d 1381, 1384 n. 5 (11th Cir.1990). That is, we make an independent assessment of whether the bankruptcy court's fact-findings are clearly erroneous. *United States Abatement Corp. v. Mobil Exploration and Producing U.S., Inc. (In re United States Abatement Corp.)*, 79 F.3d 393, 397 (5th Cir.1996). We may conclude that a fact-finding of the bankruptcy court is clearly

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the plan comply with the applicable provisions of chapter 11, such as section 1122 and 1123, governing classification and contents of plan."), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368.

erroneous only if "we are left with the definite and firm conviction that a mistake has been made." *Chamberlain v. Commissioner*, 66 F.3d 729, 732 (5th Cir.1995).

III. DISCUSSION

SWEPCO and the CCM (collectively, the Appellants) contend that the district court erred by usurping the bankruptcy court's fact-finding role and subsequently determining that the payments from SWEPCO to the CCM violated the Bankruptcy Code and rendered the SWEPCO Plan unconfirmable as a matter of law. We address in turn each of the sections of the Bankruptcy Code upon which the district court predicated its determination that SWEPCO's payments to the CCM rendered the SWEPCO Plan unconfirmable as a matter of law and that disgorgement of the payments was required.

A. Section 1129(a)(4)

The district court concluded that SWEPCO's payment to the CCM violated 11 U.S.C. § 1129(a)(4). Section 1129(a)(4) provides that a court shall not confirm a Chapter 11 plan of reorganization unless

> [a]ny payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

11 U.S.C. § 1129(a)(4). Both the bankruptcy court and the district court rejected the Appellants' contention that

§ 1129(a)(4) is entirely inapplicable to SWEPCO's payments to the CCM. We agree.

In determining a statute's meaning, "the beginning point must be the language of the statute." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 474 (1992); *see also Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 511 (5th Cir.1997). Section 1129(a)(4) by its terms requires court approval of "[a]ny payment made or to be made by the proponent . . . for services or for costs and expenses in or in connection with the case." 11 U.S.C. § 1129(a)(4) (emphasis added). The bankruptcy court's findings of fact indicate that this language covers the payments at issue here.

The bankruptcy court found that the payments were the culmination of negotiations that began in November 1996. The November 12, 1996 letter from SWEPCO's counsel to the CCM's counsel, attached to the November 13, 1996 memorandum from Kleiman to the CCM members, indicates that the payments contemplated by these negotiations were to be for "fees and expenses incurred by the Members Committee in connection with the confirmation and adversary proceeding." Further, SWEPCO's January 9, 1997 letter, which described the terms surrounding the payments, states that the payments were "intended to address the[ ] concerns [of increased financial pressure on the CCM caused by the disqualification of its counsel] and allow the parties to continue to pursue the serious bankruptcy issues." SWEPCO and the CCM can hardly argue that the payments were not "for services or for costs and expenses in or in connection with the [bankruptcy] case." 11 U.S.C. § 1129(a)(4); *see also Leiman v. Guttman*, 336 U.S. 1, 5, 8 (1949) (noting that "all payments," "in connection with," and "incident to," as used in section 221(4) of the Bankruptcy

Act, the statutory precursor to § 1129(a)(4), constituted "pervasive terms" that rendered the statute applicable to a broad array of payments not limited to those payable out of the bankruptcy estate); *In re Talley*, 97 B.R. 312, 315 (Bankr.W.D.La.1989) (indicating that *Leiman* warrants a broad reading of § 1129(a)(4)). While a strong argument might be made that payments that are not made to fiduciaries and that do not deplete the bankruptcy estate need not be subject to court approval, this is simply not the decision that Congress has chosen to make. *See In re Hendrick*, 45 B.R. 976, 985 (M.D.La.1985) (noting the compelling nature of a plan proponent's contention that judicial scrutiny of its payment of legal fees that did not deplete the bankruptcy estate was unnecessary but concluding that the plain language of § 1129(a)(4) rendered the payments subject to review by the bankruptcy court); Kenneth M. Klee, *Adjusting Chapter 11: Fine Tuning the Plan Process*, 69 AM.BANKR.L.J. 551, 567 (1995) (noting that "[s]ection 1129(a)(4) . . . has been interpreted literally to require court approval of payment of professional fees from assets of third parties, even in the context of a creditor's plan" and contending that "[t]his paragraph of § 1129(a) should be amended to apply only to payments made from estate funds."). The plain language of § 1129(a)(4) compels us to conclude that SWEPCO's payments to the CCM were subject to bankruptcy court approval.

The plain language of § 1129(a)(4), however, likewise leads us to reject the district court's construction of § 1129(a)(4) as requiring in all circumstances that the bankruptcy court review a payment subject to § 1129(a)(4) for reasonableness prior to the making of the payment. The language of the statute merely states that, as a condition precedent to plan confirmation, any payment "made or to be made by the proponent . . . for services

or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case" must "ha[ve] been approved by, or [be] subject to the approval of, the court as reasonable." 11 U.S.C. § 1129(a)(4). Nothing in this language purports to require that the bankruptcy court review a pre-confirmation payment prior to its being made.

Furthermore, the legislative history of the statute provides no indication that Congress intended to impose such a requirement. *See Ashland Chem. Inc. v. Barco Inc.*, 123 F.3d 261, 266 (5th Cir.1997) ("Where a statute is silent or ambiguous as to an issue, we next look to the legislative history for guidance as to the intent of the legislators."). The House Report addressing § 1129(a)(4) provides as follows:

> Paragraph (4) is derived from section 221 of present law. It requires that any payment made or promised by the proponent . . . for services or for costs and expenses in, or in connection with, the case, or in connection with the plan and incident to the case, be disclosed to the court. In addition, any payment made before confirmation must have been reasonable, and any payment to be fixed after confirmation must be subject to the approval of the court as reasonable.

H.R.REP. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368. It does not logically follow from the fact that a pre-confirmation payment "must have been reasonable" that the determination that the payment was reasonable must have preceded the payment.

Additionally, it is noteworthy that other sections of the Bankruptcy Code demonstrate that, when Congress wishes to

impose a requirement of pre-payment judicial approval, it knows how to say so. Section 330, for example, provides for the award of "reasonable compensation" to "a trustee, an examiner, [or] a professional person employed under section 327 or 1103" only "[a]fter notice to the parties in interest and the United States Trustee and a hearing." 11 U.S.C. § 330(a). Similarly, § 331 provides that "[a] trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103" may apply for interim compensation or reimbursement, and that the court may award such compensation or reimbursement "[a]fter notice and a hearing." *Id.* § 331. We conclude that Congress's express provision for pre-payment judicial review of payments in other sections of the Code renders its silence with respect to the timing of the judicial determination of the reasonableness of a payment subject to § 1129(a)(4) meaningful.

We decline to impose a requirement that the bankruptcy court determine the reasonableness of pre-confirmation payments by a plan proponent prior to the making of the payments in the absence of any manifestation of congressional intent to create such a requirement. At most, the statute, informed by other provisions of the Code and its legislative history, can be read to require that pre-confirmation payments "ha[ve] been approved by . . . the court as reasonable" prior to confirmation. 11 U.S.C. § 1129(a)(4). In this regard, the bankruptcy court correctly concluded that the SWEPCO Plan cannot be approved unless and until it reviews SWEPCO's payments to the CCM and concludes that they were reasonable. Assuming that this review takes place and the bankruptcy court concludes that the payments were reasonable (and such determination is not clearly erroneous), § 1129(a)(4) poses no

barrier to the confirmation of the SWEPCO Plan.[4] We therefore conclude that the district court erred in holding that § 1129(a)(4) bars confirmation of the SWEPCO Plan solely because SWEPCO did not obtain a determination from the bankruptcy court that its payments to the CCM were reasonable prior to making them.

The district court went on to conclude that the payments could not comply with § 1129(a)(4) because they were made for an improper purpose, *i.e.*, to buy the votes of the CCM members for the SWEPCO Plan, and thereby concluded that the bankruptcy court's conclusion to the contrary was clearly erroneous. However, the Trustee and the Appellants both agree that the CCM members' votes were, as a practical matter, "not worth buying"[5] because, to say the least, they did not control the class of unsecured creditors containing their claims and, in their capacity as equity interest holders in Cajun,[6] were deemed

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4. In the event that the bankruptcy court determines that the payments were, in whole or in part, unreasonable, it will doubtless order the disgorgement of the unreasonable portion of the payments. Assuming that the CCM were to comply with such an order—we were advised at oral argument that the CCM has expressly agreed to do so—§ 1129(a)(4) would in all probability pose no barrier to confirmation of the SWEPCO Plan.

5. In his brief, the Trustee states, "Appellants cheapen the Members' critical role in this case by deeming their votes 'not worth buying.' . . . Literally, this is true."

6. We note that there may be some question as to whether the members' interests in Cajun constitute "equity interests" in the strict sense of the term. *Cf. Wabash Valley Power Ass'n v. United States (In re Wabash Valley Power Ass'n)*, 72 F.3d 1305 (7th Cir.1995) (noting

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to have voted against all three proposed plans because they received no property under any of them. Under the circumstances, the district court's conclusion that the bankruptcy court clearly erred in deciding that the payments at issue here did not constitute vote-buying was itself erroneous.

The Trustee argues, however, that the payments were nonetheless unreasonable because they were made to buy the CCM members' support for the SWEPCO Plan in the specific form of an exclusive agreement to enter into power- supply agreements with SWEPCO (as set out in the SWEPCO/CCM term sheets filed with the bankruptcy court), thereby impeding the efforts of the proponents of the other two plans to negotiate voluntary power-supply agreements with the CCM members. The term sheets reflect that the CCM members have agreed, expressly subject to the Bankruptcy Code, to enter into power-supply agreements with SWEPCO and no other party "unless or until an order is issued i) denying confirmation of the [SWEPCO] Plan; ii) confirming a plan proposed by another plan proponent; or iii) expressly authorizing support of another plan that has been materially amended from its current version." As counsel for the Trustee indicated in argument before the district court, it is this agreement that the Trustee challenges as unreasonable and unlawful under the Bankruptcy Code.

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that members of a cooperative organized under Indiana law "are not owners in any usual sense of the term" and that, "[b]y design, in a co-operative association the concept of profit is inappropriate, because profit, in its recognized economic sense, is the wage of the entrepreneur, and in a co-operative there is no entrepreneur"). However, as indicated *infra*, our decision hinges in no way upon the characterization of the members' various interests in Cajun as debt or equity-based. For purposes of this appeal, we therefore accept the parties' characterization of Cajun's members as possessing both debt claims and equity interests.

Appendix A

Even if we assume, strictly for purposes of argument, that the SWEPCO/CCM term sheets contain provisions that render the SWEPCO Plan unconfirmable, it does not follow inexorably that SWEPCO's payments to the CCM served as consideration for such provisions. Because the only issue litigated before the bankruptcy court and the district court was the propriety of SWEPCO's payments to the CCM (and *not* the propriety of the SWEPCO/CCM term sheets in a more general sense), the potential viability of the Trustee's argument on appeal hinges upon a factual determination that SWEPCO conditioned the CCM members' retention of the payments upon their consent to the agreements reflected in the SWEPCO/CCM term sheets. It is in this regard that the Trustee's argument fails because the bankruptcy court made a fact-finding that the payments were not so conditioned. Specifically, the bankruptcy court concluded that the payments were "generally made without strings attached," and that "[t]he only requirement was that the funds would be repaid to SWEPCO in the event that . . . another plan was confirmed and the Members received reimbursement under the confirmed plan." We cannot say that this fact-finding is clearly erroneous.

During the six-day hearing that the bankruptcy court conducted on the Trustee's motion, it heard the testimony of numerous witnesses, including SWEPCO's president and representatives of the CCM members who were involved in the negotiations surrounding SWEPCO's payments to the CCM. The parties involved in these negotiations testified uniformly that the only circumstance in which SWEPCO would require the CCM members to repay the funds was if another plan was confirmed and another plan proponent reimbursed the CCM members' legal expenses. The bankruptcy court was free to, and did, credit this testimony.

Appendix A

The Trustee capitalizes upon the fact that the January 9, 1997 letter from SWEPCO's counsel states that, "[i]n the event any Member supports another plan or receives reimbursement from any other proponent, then the Member cooperative agrees to promptly reimburse SWEPCO for the respective expenses paid by SWEPCO and received by such Member." (emphasis added). Admittedly, this sentence, considered in a vacuum, indicates that the CCM members must return the funds in the event that they simply support another plan. However, the letter does not specify what the phrase "supports another plan" means, and it is unclear whether simply entering into a power-supply agreement with another plan proponent would of itself constitute "support" for another plan as that term is used in the letter. Moreover, the very next sentence of the letter states that "[t]he cooperative also agrees to use its best efforts to obtain reimbursement from any other proponent, in the event the said cooperative elects to endorse another plan." If the CCM members had an absolute obligation to return SWEPCO's payments in the event that they simply chose to support another plan, SWEPCO would likely have little, if any, interest in ensuring that the CCM members obtained reimbursement for their legal expenses from another plan proponent. So long as SWEPCO is repaid, it is doubtful that SWEPCO would care one way or the other whether the CCM members obtain reimbursement as well.

Moreover, the January 9, 1997 letter, as modified by Kleiman's January 16, 1997 letter, provided that, "[i]n the event of an adverse court ruling such that the SWEPCO/[ ]Members Committee Plan is not approved by the court, but rather a different plan is approved by the court, and the plan proponent does not reimburse the Members' attorneys fees and expert fees, the Members will have no obligation to reimburse SWEPCO,"

and, "in the event that no plan is confirmed, then in such event the Members shall have no obligation to reimburse SWEPCO." Additionally, the memorandum that Kleiman sent the CCM members on the same date as the January 9, 1997 letter states that the "only condition [on the CCM members' retention of the $1 million paid by SWEPCO] is that the Members will use their best efforts to have that amount repaid in the event that they support a different plan proponent at some date in the future."

In light of this testimonial and documentary evidence, we are not left with the firm and definite conviction that the bankruptcy court made a mistake in determining that SWEPCO did not condition the CCM members' retention of its payments upon their agreeing to the terms set forth in Paragraph VI.A of the SWEPCO/CCM term sheets. The bankruptcy court's fact-finding in this regard is therefore not clearly erroneous. *See Chamberlain*, 66 F.3d at 732. As stated earlier, we therefore have no occasion to determine whether the provisions of this paragraph in the term sheets in any way render the SWEPCO Plan unconfirmable. It is for the bankruptcy court to determine in the first instance during the confirmation process whether any portion of the SWEPCO/CCM term sheets renders the SWEPCO Plan unconfirmable.[7]

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7. We note that the bankruptcy court concluded that the SWEPCO/CCM term sheets did not create an impermissible lock-in between SWEPCO and the CCM members. We have declined to address the correctness of this conclusion solely because it is unnecessary to our disposition of this appeal, which involves only the propriety of SWEPCO's payments to the CCM. Our failure to address the bankruptcy court's conclusion that no impermissible lock-in exists should in no way be construed as implying that this conclusion is problematic.

We likewise do not decide whether the payments at issue are otherwise reasonable. The ultimate determination of the reasonableness of the payments is a matter to be decided in the first instance by the bankruptcy court, and it will take up this matter on disposition of the pending application for *nunc pro tunc* approval of payments filed by SWEPCO and the CCM members.

We note that § 1129(a)(4)'s requirement that the bankruptcy court determine whether payments subject to the subsection are "reasonable" creates a "relatively open-ended standard [that] is potentially ambiguous." *See* 7 COLLIER ON BANKRUPTCY ¶ 1129.03[4], at 1129-39 (Lawrence P. King ed., 15th ed. rev. 1998). What constitutes a reasonable payment will clearly vary from case to case and, among other things, will hinge to some degree upon who makes the payments at issue, who receives those payments, and whether the payments are made from assets of the estate. In the typical case, payments that are not payable from, or reimbursable by, the bankruptcy estate should not engender anything like the judicial scrutiny devoted to those that are payable out of the bankruptcy estate. Where the bankruptcy court has determined that the payment at issue was for an expense that is routine in the confection and confirmation of a plan (e.g., for legal or accounting services, expert witness fees, printing, etc.) and that the payment has not been made from and will not be reimbursed by the bankruptcy estate, the court will ordinarily have little reason to inquire further with respect to the amount charged. Bankruptcy courts in general, and this one in particular, are sufficiently overburdened that they and we should be chary about succumbing to the exhortations of litigants to turn § 1129(a)(4) into a mandate for an expensive and unnecessary inquiry.

Appendix A

B. Section 1125

The district court also concluded that SWEPCO's payments to the CCM violated 11 U.S.C. § 1125 because the payments were not adequately disclosed. Section 1125(b) provides as follows:

> An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

11 U.S.C. § 1125(b). Section 1125(a)(1) defines "adequate information" as that term is used in subsection (b) to include "information of a kind, and in sufficient detail, as far as is reasonably practicable . . . that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan." *Id.* § 1125(a)(1).

The legislative history of § 1125 indicates that, in determining what constitutes "adequate information" with respect to a particular disclosure statement, "[b]oth the kind and form of information are left essentially to the judicial discretion of the court" and that "[t]he information required will necessarily be governed by the circumstances of the case."

S.REP. NO. 95-989, at 121 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5907; *see also Texas Extrusion Corp. v. Lockheed Corp. (In re Texas Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir.1988) ("The determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court."), *vacated on other grounds, Adams v. First Fin. Dev. Corp. (In re First Fin. Dev. Corp.)*, 960 F.2d 23 (5th Cir.1992).

Assuming without deciding that a reasonable investor would consider information regarding SWEPCO's payments to the CCM, which were not made out of the bankruptcy estate's assets, material to an informed judgment about the SWEPCO Plan, we conclude that the bankruptcy court did not abuse its discretion in determining that SWEPCO's supplemental disclosure statement adequately disclosed the possibility of the payments by SWEPCO to the CCM. The supplemental disclosure statement provided that "SWEPCO may agree to pay certain expenses of the Members Committee in regard to certain litigation and the plan confirmation process." This statement is not limited to post- confirmation payments and thus covers the payments at issue here. While it is true that the statement is quite general, "we find that the bankruptcy court did not abuse its discretion in holding that the [supplemental disclosure statement] nevertheless was adequate to enable a reasonable creditor to make an informed judgment about the [SWEPCO] Plan." *Id.* The district court therefore erred in reversing the bankruptcy court's determination that SWEPCO's supplemental disclosure statement contained adequate information with respect to the payments by SWEPCO to the CCM.

C. Section 1123(a)(4)

The district court also concluded that SWEPCO's payments to the CCM constituted a violation of 11 U.S.C. § 1123(a)(4), which provides that, "[n]otwithstanding any otherwise applicable nonbankruptcy law, a plan shall . . . provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). However, SWEPCO's payments to the CCM did not constitute discrimination amongst claims of the same class as contemplated by this section because the payments were not derived, directly or on this record indirectly, from assets of the bankruptcy estate, a fact that the district court acknowledged when it ordered the payments returned to SWEPCO rather than added to the bankruptcy estate. Moreover, as the bankruptcy court found, the payments were not made in satisfaction of the CCM members' claims against Cajun, but rather as reimbursement for plan and litigation expenses incurred in the bankruptcy case. Accordingly, the payments did not violate § 1123(a)(4).

D. Section 1129(b)

The district court also concluded that SWEPCO's payments to the CCM violated 11 U.S.C. § 1129(b). Section 1129(b) allows confirmation of a plan upon request of the proponent despite the rejection of the plan by one or more classes "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1); 3 DAVID G. EPSTEIN ET AL., BANKRUPTCY § 10-19, at 35 (1992). The subsection provides that, "[w]ith respect to a

class of unsecured claims," a plan is "fair and equitable" only if "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property." 11 U.S.C. § 1129(b)(2)(B)(ii). This is known as the absolute priority rule. *See Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1276 (5th Cir.1991).

The district court's conclusion that SWEPCO's payments to the CCM violated the absolute priority rule is problematic for the same reasons that led us to reject the district court's conclusion that the payments violated § 1123(a)(4). In particular, the payments were not made "on account of [the CCM members'] [unsecured] claim[s] or [their equity] interest[s]." 11 U.S.C. § 1129(b)(2)(B)(ii). Accordingly, the district court erred in concluding that § 1129(b) precluded confirmation of the SWEPCO Plan by reason of SWEPCO's payments to the CCM.

E. Section 1129(a)(3)

The district court also concluded that, in light of SWEPCO's payments to the CCM, 11 U.S.C. § 1129(a)(3) precluded confirmation of the SWEPCO plan as a matter of law because the payments were themselves improper and SWEPCO further improperly concealed them Section 1129(a)(3) provides that a plan may not be confirmed unless "[t]he plan has been proposed in good faith and not by any means forbidden by law."

In construing § 1129(a)(3), we have noted that "[t]he requirement of good faith must be viewed in light of the totality

of the circumstances surrounding establishment of a Chapter 11 plan, keeping in mind the purpose of the Bankruptcy Code is to give debtors a reasonable opportunity to make a fresh start." *Financial Sec. Assurance Inc. v. T-H New Orleans Ltd. Partnership (In re T-H New Orleans Ltd. Partnership)*, 116 F.3d 790, 802 (5th Cir.1997); *see also Jasik v. Conrad (In re Jasik)*, 727 F.2d 1379, 1383 (5th Cir.1984) ("The 'good faith' of a reorganization plan must be 'viewed in light of the totality of the circumstances surrounding confection' of the plan." (quoting *Public Fin. Corp. v. Freeman*, 712 F.2d 219, 221 (5th Cir.1983))). We have also observed that "[t]he bankruptcy judge is in the best position to assess the good faith of the parties' proposals." *Id.*

The bankruptcy court made a factual determination that the payments were not made in bad faith and that SWEPCO and the CCM at all times intended to make appropriate disclosures. We cannot say that this fact-finding was clearly erroneous. Additionally, neither the district court nor the Trustee has demonstrated any independent illegality that would implicate § 1129(a)(3)'s requirement that a plan proponent not propose a plan "by any means forbidden by law." *See* 11 U.S.C. § 1129(a)(3). As such, the district court erred in concluding that § 1129(a)(3) rendered the SWEPCO Plan unconfirmable as a matter of law by reason of SWEPCO's payments to the CCM.

Appendix A

CONCLUSION

The district court erred in "disqualifying" the SWEPCO Plan on the ground that it is unconfirmable as a matter of law by reason of SWEPCO's payments to the CCM. Because the bankruptcy court has not yet determined the reasonableness of these payments, the district court likewise erred in ordering their disgorgement. We therefore REVERSE the district court's orders disqualifying the SWEPCO Plan and requiring disgorgement of the payments from SWEPCO to the CCM. The stay entered by this court on July 10, 1998 is vacated. The costs of this appeal shall be borne by the appellees. The mandate shall issue forthwith.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF LOUISIANA DATED JUNE 18, 1998 AND FILED JUNE 19, 1998

CIVIL ACTION
NO. 94-2763-B2

BANKRUPTCY CASE
NO. 94-11474

Chapter 11

In re:

CAJUN ELECTRIC POWER COOPERATIVE, INC.,

Debtor.

Federal Tax Id. No.: 72-0655799

ORDER OF APPEAL

THIS MATTER came up for hearing on June 16, 1998, on the appeal of the Order of the United States Bankruptcy Court dated September 8, 1997 (Docket No. 3263) (the "Order").

For oral reasons given in Open Court on the record, including the findings of fact and conclusions of law, considering the pleadings filed by the parties, the arguments of counsel, the law and evidence appearing in favor thereof,

Appendix B

IT IS ORDERED, ADJUDGED and DECREED as follows:

1. The motion of the Trustee for Leave to Appeal the Order (Docket No. 3279) is hereby granted for reasons given in Open Court on the record.

2. The following motions are hereby granted: Motion of Louisiana Public Service Commission to File Amicus Brief (docket no. 3518); Motion of Clairborne Electric Cooperative, Inc. for Leave to File Amicus Brief (docket no. 3548).

3. With respect to the cross-appeal of the Appellees, the ruling and Order of the Bankruptcy Court is affirmed in part, and the Court finds that 11 U.S.C. §1129(a)(4) applied to the $1,000,000.00 payment made by Southwestern Electric Power Company ("SWEPCO") to the seven constituent members of the Committee of Certain Members of Cajun Electric Power Cooperative, Inc. ("CCM"), being Beauregard Electric Cooperative, Inc., Dixie Electric Membership Corporation, Jefferson Davis Electric Cooperative, Inc., Northeast Louisiana Power Cooperative, Inc., South Louisiana Electric Cooperative Association, Valley Electric Membership Corporation, and Washington-St. Tammany Electric Cooperative, Inc. (collectively the "CCM Co-Ops").

4. With respect to the appeal of the Appellants of the Order, the ruling and Order of the Bankruptcy Court is otherwise reversed.

5. The plan of reorganization filed by SWEPCO and the CCM is not confirmable as a matter of law, and is hereby disqualified.

Appendix B

6. On or before June 30, 1998, each CCM Co-Op shall disgorge and refund to SWEPCO the entire amount it received from the $1,000,000 payment made by SWEPCO. On or before June 30, 1998, each cooperative shall file a written verification in the record of this case attesting to the return of such funds to SWEPCO.

7. Any exclusivity obligation contained in the SWEPCO term sheets and in any other documents executed by the CCM Co-Ops in favor of the SWEPCO Plan is stricken and shall not be enforced.

8. On June 25, 1998, at 9:00 o'clock a.m., each CCM Co-Op shall appear before the Court through its attorney, a general manager or president (or other chief executive officer), and a representative of the Board of Directors.

JUDGMENT READ, RENDERED, AND SIGNED at Baton Rouge, Louisiana this 19 day of June, 1998.

s/ Frank J. Polozola
Honorable Frank J. Polozola
United States District Judge
Middle District of Lousiana

EOD 6/19/98
NOTICE MAILED TO:
On 6/19/98 By Regina Callihan
David S. Rubin
Ralph R. Mabey
Office of the U.S. Trustee

APPENDIX C — TRANSCRIPT OF JUDGE FRANK J. POLOZOLA'S ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA DATED JUNE 16, 1998

[1] * * *

[2] (CIVIL 94-2763-B2 / BANKRUPTCY 94-11474)

THE COURT: AS I SAID BEFORE LUNCH, THE COURT IS PREPARED TO RULE AND THAT'S WHAT I WOULD LIKE TO DO THIS AFTERNOON.

THIS MATTER IS BEFORE THE COURT ON APPEALS TAKEN BY BOTH THE APPELLANT AND THE APPELLEE IN THIS PARTICULAR CASE, ALTHOUGH LITTLE ARGUMENT WAS REALLY MADE ON THE APPELLEE'S APPEAL.

THE FIRST ISSUE THE COURT MUST DETERMINE THIS AFTERNOON IS WHETHER OR NOT THE COURT SHOULD GRANT THE PARTIES LEAVE TO APPEAL. THE APPELLANTS — AND WHEN I SAY APPELLANTS, I AM REFERRING TO THE TRUSTEE, TO ENRON, CAPITAL AND TRADE RESOURCES, INCORPORATED, LOUISIANA GENERATING LLC, AMERICA COMMERCIAL MARINE SERVICES, TRITON COAL COMPANY, WESTIN FUELS ASSOCIATION, INCORPORATED, AND RURAL UTILITIES SERVICES OF THE DEPARTMENT OF AGRICULTURE; AND I WILL PERIODICALLY REFER TO THESE AS THE APPELLANTS.

SWEPCO AND THE COMMITTEE OF CERTAIN MEMBERS, WHICH SOMETIMES I WILL REFER TO AS CCM AND SWEPCO, HAVE ALSO TAKEN ONE APPEAL

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INSOFAR AS THE RULING OF THE BANKRUPTCY JUDGE THAT THE SWEPCO PAYMENT COVERED BY SECTION 1129(A)(4). BUT TO AVOID CONFUSION IN THE CASE, WHEN I SAY APPELLANTS, I AM REFERRING TO THE TRUSTEE AND THE OTHER ENTITIES THAT I DESCRIBED, BUT [3] WHEN I SAY APPELLEE, I AM REFERRING TO SWEPCO AND THE COMMITTEE OF CERTAIN MEMBERS.

WE WILL HANDLE THE ONE SMALL APPEAL TAKEN BY SWEPCO AT THE END OF THE OPINION AND IN OTHER PLACES, TOO.

THE FIRST ISSUE THE COURT HAS TO DETERMINE IS WHETHER OR NOT THE COURT SHOULD GRANT THE PARTIES LEAVE TO APPEAL IN THIS CASE. THE APPELLANTS WANT THE COURT TO GRANT SUCH LEAVE. THE APPELLEES, FRANKLY, DID NOT WANT THE COURT TO DO IT. THIS MORNING I RULED THAT THE COURT WAS GOING TO AND DID, IN FACT, GRANT THE PARTIES LEAVE TO APPEAL THE ISSUE IN THIS CASE. I THINK THE REASON THAT THE COURT SHOULD HEAR THE APPEAL IN THIS CASE AT THIS TIME IS THAT THE APPEAL COVERS ISSUES THAT ARE VERY IMPORTANT IN THIS CASE AT THIS TIME, PARTICULARLY AT THE STAGE OF PROCEEDINGS THAT MATTERS BEFORE THE BANKRUPTCY COURT PRESENTLY STAND.

THE COURT'S DECISION THIS AFTERNOON COULD AND PROBABLY WILL DIRECTLY AFFECT THE PLAN OR EVEN A POSSIBLE SETTLEMENT OF VARIOUS PLANS THAT ARE NOW PENDING BEFORE THE BANKRUPTCY COURT.

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I THINK BECAUSE OF THE NATURE OF THE ISSUES RAISED IN THIS APPEAL, THE PARTIES DESERVE PROMPT RESOLUTION OF THIS ISSUE. WHEN I READ THE REPORT OF THE BANKRUPTCY JUDGE, I ALSO FELT THAT IT WAS THE [4] BANKRUPTCY JUDGE'S RECOMMENDATION THAT THE COURT SHOULD TRY TO RESOLVE THE ISSUE.

THERE IS NO QUESTION IN THIS COURT'S MIND THAT THE ISSUE NOW BEFORE THE COURT AND THE RESOLUTION THEREOF WOULD BE IN THE INTEREST OF JUSTICE. I ALSO FEEL IT WOULD BE IN THE INTEREST OF JUDICIAL ECONOMY, NOT ONLY FOR THE PARTIES, PARTICULARLY THE DEBTOR AND THE CREDITORS, BUT ALSO THE RATE PAYERS. AND I THINK IT IS IMPORTANT THAT THE COURT, WHETHER IT'S THE BANKRUPTCY COURT OR THIS COURT, OR EVEN THE APPELLANT COURTS, TRY TO GET THIS ISSUE BEHIND US AND GET THE RESOLUTION OF THE BANKRUPTCY PROCEEDINGS TO AN EARLY CONCLUSION. THE COURT BELIEVES THAT THIS WOULD BE IN THE BEST INTEREST OF EVERYONE.

AND ALSO, WHEN YOU LOOK AT THE INTEREST OF JUDICIAL ECONOMY FOR THE COURT, THE COURT IS VERY BUSY. FORTUNATELY WE WILL BE GETTING ANOTHER JUDGE SOON. HOPEFULLY. BUT I THINK THE FACT THAT THE COURT HAS READ ALL THE MATERIAL INVOLVED AND THE COURT KNOWS THIS CASE BECAUSE OF THE COURT'S INVOLVEMENT IN THE CASE EVEN BEFORE THE BANKRUPTCY BEGAN, GIVES THIS COURT THE OPPORTUNITY TO NOT ONLY CAREFULLY REVIEW THE ISSUES BUT DO SO WITH

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FULL KNOWLEDGE OF MOST OF THE BACKGROUND AND MOST OF THE ISSUES THAT HAVE COME BEFORE THIS COURT IN THE PAST, AS WELL AS THE [5] BANKRUPTCY COURT SINCE THE BANKRUPTCY CASE HAS BEEN PENDING.

I THINK THIS CASE IS A MATTER OF GREAT PUBLIC CONCERN. A NUMBER OF REGULATORY AGENCIES ARE INVOLVED, WHETHER IT'S THE LOUISIANA PUBLIC SERVICE COMMISSION OR ANY OF THE FEDERAL AGENCIES THAT HAVE JURISDICTION IN THIS PARTICULAR CASE. I ALSO THINK IT WILL AID THE BANKRUPTCY COURT IN RESOLVING ANY PENDING ISSUES THAT THE BANKRUPTCY COURT NOW HAS TO CONSIDER.

EVERYBODY CONCEDES THE MATTER IS DISCRETIONARY WITH THE COURT, BUT FRANKLY I THINK IT WOULD BE A GROSS ABUSE OF THE COURT'S DISCRETION NOT TO HEAR THE APPEAL AT THIS TIME. IT'S CLEAR THE ISSUE IS RIPE FOR RESOLUTION AND, THEREFORE, THE COURT BELIEVES THAT AN ISSUE SUCH AS THIS THAT INVOLVES A MATTER OF GREAT IMPORTANCE TO THE ADMINISTRATION OF JUSTICE IN THE MIDDLE DISTRICT SHOULD BE RESOLVED AS QUICKLY AS POSSIBLE. THEREFORE, THE COURT BELIEVES THAT IF LEAVE OF COURT IS REQUIRED FOR THE COURT TO CONSIDER THE APPEAL TAKEN HEREIN, THAT THE COURT HEREBY GRANTS THE APPEAL.

THE REASON I SAY THAT IS, YOU KNOW, THE COURT HAS WITHDRAWN THIS BANKRUPTCY CASE. I

HAVE BEEN INVOLVED IN THIS CASE SINCE ITS INCEPTION AND I'VE PERIODICALLY REFERRED MANY THINGS TO THE BANKRUPTCY COURT, MORE SO [6] SINCE THE MATTER THAT INVOLVED THE CASE THAT I TRIED FOR SOME FOUR-AND-A-HALF-MONTHS HAS BEEN RESOLVED AND ALL THE ISSUES PERTAINING THERETO HAVE BEEN SATISFIED ON APPEAL. BUT IN THE LAST OPINION THAT THE FIFTH CIRCUIT RENDERED INVOLVING CAJUN ELECTRIC POWER COOPERATIVE VERSUS THE OFFICIAL, AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS VERSUS CAJUN ELECTRIC POWER CO-OP AND OTHERS RENDERED BY THE FIFTH CIRCUIT ON AUGUST 5TH, 1997, THE FIFTH CIRCUIT SPENT SOME TIME DISCUSSING ITS JURISDICTION. AND THE COURT NOTED THAT THE DISTRICT COURT DID NOT SIT AS A BANKRUPTCY APPEALS COURT BUT HEARD THE CASE ITSELF AS A COURT OF BANKRUPTCY. THEREFORE, 28 USC SECTION 158(D) DID NOT CONFER APPELLATE JURISDICTION IN THIS CASE, BUT INSTEAD SECTION 1291 DID.

IN THIS CASE SOMETIMES I GET A LITTLE CONFUSED AS TO WHETHER I AM REVIEWING AS A REPORT AND RECOMMENDATION FROM THE BANKRUPTCY OR AS AN APPEAL TO THE DISTRICT COURT BECAUSE OF A MATTER REFERRED TO THE BANKRUPTCY COURT. BUT IN ANY EVENT, I THINK THE APPEAL IS PROPER BEFORE THE COURT AND, THEREFORE, THE COURT WILL HANDLE IT.

THERE ARE BASICALLY TWO SEPARATE ISSUES ON APPEAL: THE SWEPCO INTERESTS HAVE

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APPEALED THE DECISION OF THE BANKRUPTCY COURT WHICH HELD THAT THIS [7] SWEPCO PAYMENT WAS COVERED BY SECTION 1129(A)(4). LITTLE, IF ANY, ARGUMENT WAS MADE ON THAT POINT THIS MORNING. AND I THINK IT'S CLEAR TO ME THAT THE BANKRUPTCY COURT WAS CORRECT IN ITS CONCLUSION THAT SECTION 1129(A)(4) APPLIED TO THE SWEPCO PAYMENT.

THE BIG ISSUE INSOFAR AS THE APPELLANTS ARE CONCERNED IS WHETHER OR NOT THOSE PAYMENTS HAD TO BE APPROVED BEFORE THEY WERE MADE, OR NUNC PRO TUNC AS THE BANKRUPTCY COURT SUGGESTED. AND WE'LL WILL HEAR — I WILL MAKE SOME DECISIONS ON THAT IN A SECOND. BUT INSOFAR AS THE APPEAL TAKEN BY SWEPCO, THE BANKRUPTCY JUDGE'S DECISION INSOFAR AS THE APPLICABILITY OF 1129(A)(4) TO THIS PAYMENT IS AFFIRMED.

AS TO WHEN THE APPROVAL HAS TO BE MADE WILL COME UP INSOFAR AS THE ISSUES BROUGHT BY THE APPELLEES ON APPEAL.

THERE ARE SEVERAL ISSUES RAISED BY APPELLANTS INSOFAR AS THE BANKRUPTCY COURT'S RULING. ONE, DID THE BANKRUPTCY COURT ERR IN NOT IMMEDIATELY DISQUALIFYING THE SWEPCO PLAN? TWO, DID THE BANKRUPTCY COURT ERR IN ATTACHING CREDIBILITY TO THE TESTIMONY OF SWEPCO AND CERTAIN MEMBERS, THAT THE SWEPCO PAYMENT WAS GIVEN TO THE CERTAIN MEMBERS WITH NO EXPECTATION OF ANYTHING IN

RETURN FOR THE PAYMENT [8] WHEN DOCUMENTS EXECUTED CONTEMPORANEOUSLY BY THE PARTIES, TOGETHER WITH THE PARTIES CONDUCT CLEARLY DEMONSTRATE AN AGREEMENT FOR EXCLUSIVE SUPPORT OF THE SWEPCO PLAN TO EXCHANGE FOR THE PAYMENT? THREE, DID THE BANKRUPTCY COURT ERR IN FINDING THAT PURSUANT TO 11 UNITED STATES CODE SECTION 1125 AND 1129, SWEPCO MADE FULL, ADEQUATE AND CONTINUING DISCLOSURE OF THE SWEPCO PAYMENT? FOURTH, DID THE BANKRUPTCY COURT ERR IN FINDING THAT THE SWEPCO PAYMENT MADE TO EQUITY HOLDERS, WHO ARE ALSO CREDITORS, DID NOT RENDER THE SWEPCO PLAN UN-CONFIRMABLE AND, THEREFORE, SUBJECT TO IMMEDIATE DISQUALIFICATION? AND FIVE, DID THE BANKRUPTCY COURT ERR IN FINDING THAT IN MAKING THE SWEPCO PAYMENT, SWEPCO COMPLIED OR COULD COMPLY WITH THE PROVISIONS OF THE BANKRUPTCY CODE, INCLUDING SECTIONS 1129(A)(1), (2), (3) AND (4)?

NOW, THE STANDARD OF REVIEW IS AND WAS BASICALLY AGREED TO BY THE PARTIES. I THINK THE STANDARD OF REVIEW OF THE DECISION OF THE BANKRUPTCY JUDGE INSOFAR AS HIS FINDINGS OF FACT ARE CONCERNED IS UNDER THE CLEARLY ERRONEOUS STANDARD.,

INSOFAR AS QUESTIONS OF LAW ARE CONCERNED, THE COURT BELIEVES THE STANDARD OF REVIEW IS DE NOVO. AND INSOFAR AS QUESTIONS OF FACT TO LAW IS CONCERNED, THE COURT ALSO BELIEVES THAT THE STANDARD IS DE NOVO [9] REVIEW.

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IT IS WITHIN THESE STANDARDS OF REVIEW THAT THE COURT HAS REVIEWED THIS RECORD AND IS MAKING ITS DECISION THIS AFTERNOON.

IT'S PRETTY OBVIOUS FROM PRIOR HEARINGS THAT THE COURT HAS HELD IN THIS CASE ON THESE PARTICULAR ISSUES THAT THERE IS A VOLUMINOUS RECORD INSOFAR AS THIS APPEAL IS CONCERNED.

THE COURT HAS TAKEN THE TIME TO PERSONALLY REVIEW THIS VOLUMINOUS RECORD. AND THE REASON I EMPHASIZE THAT IS THAT I WANT TO MAKE IT VERY CLEAR, BECAUSE I AM VERY SELF-CONSCIOUS OF THIS, THAT BECAUSE MY LAW CLERKS ARE GOING TO WORK FOR FIRMS THAT ARE INVOLVED IN THIS CASE, THAT NEITHER LAW CLERK HAS BEEN ASKED TO OR ACTUALLY PERFORMED ANY RESEARCH OR OTHER REVIEW IN THIS CASE.

THE MOST THAT THE LAW CLERKS HAVE DONE, FRANKLY, IS TO BRING THE RECORD EITHER TO MY CAR OR TO MY OFFICE OR CHAMBERS OR TO THE COURTROOM BUT NOTHING ELSE. AND I MAKE THAT CLEAR.

IT HAS BEEN VERY DIFFICULT TO REVIEW THE ENTIRE RECORD, PARTICULARLY THE WAY THE RECORD INITIALLY CAME UP TO THE COURT. BUT THE COURT MUST COMPLIMENT THE PARTIES IN THE MANNER IN WHICH THE PARTIES, AFTER REVIEWING THE IMPORTANT MATTERS INVOLVED IN THE [10] APPEAL, HAVE PRESENTED THE MATTER BACK TO THE COURT.

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I DO NOT PERSONALLY THINK THAT I WOULD HAVE BEEN AS PREPARED TODAY OR WOULD HAVE BEEN ABLE TO UNDERSTAND THE RECORD AS CLEARLY AS I NOW DO WITHOUT THE ASSISTANCE OF COUNSEL IN THIS CASE. AND SO, I DO COMPLIMENT COUNSEL FOR THE MANNER IN WHICH THEY WERE ABLE TO FINALLY GET THE RECORD TO THE COURT. AND PARTICULARLY I WANT TO THANK COUNSEL FOR PUTTING THE DOCUMENTS THAT ARE REALLY IMPORTANT, AND THE OTHER TESTIMONY AND PORTIONS OF THE TRANSCRIPTS, IN SUCH A MANNER THAT I COULD FIND WHAT I WANTED. AND MANY TIMES THE AREA THAT WAS IMPORTANT WAS HIGHLIGHTED FOR THE COURT. SO, I APPRECIATE COUNSELS' ASSISTANCE TO THE COURT.

BECAUSE I HAVE SPENT SO MUCH TIME REVIEWING THIS CASE AND THE RECORD, AND BECAUSE I HAVE DONE SO WITHIN THE LAST COUPLE OF WEEKS AND THE LAST COUPLE OF DAYS, I DON'T THINK THIS CASE SHOULD BE TAKEN UNDER ADVISEMENT.

MAYBE THIS CASE DESERVES A WRITTEN OPINION FROM THE COURT, BUT I RESERVE MY RIGHT TO SUPPLEMENT ANY ORAL REASONS — I SHOULDN'T SAY "ANY" — I RESERVE MY RIGHT TO SUPPLEMENT THE ORAL REASONS GIVEN THIS AFTERNOON WITH WRITTEN REASONS AT A LATER DATE IN THE EVENT APPEALS ARE TAKEN AND I BELIEVE THAT POSSIBLY [11] CERTAIN THINGS THAT I SAID MAY NOT HAVE BEEN AS CLEAR AS I WANTED IT TO BE OR OTHER THINGS SHOULD BE SET FORTH IN A WRITTEN OPINION.

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I HAVE CONSIDERED ALL OF THE RECORD AND ALL OF THE ARGUMENTS OF COUNSEL, WHETHER I SPECIFICALLY REFER TO SUCH ARGUMENTS THIS AFTERNOON OR DISCUSS THEM IN ANY DETAIL IN THE OPINION. YOU CAN ONLY DISCUSS SO MUCH IN AN OPINION AND MAKE IT UNDERSTANDABLE AND THAT IS WHAT I HAVE DONE.

I RENDER THIS OPINION THIS AFTERNOON WITH DEEP RESPECT FOR THE BANKRUPTCY JUDGE AND ALL THE WORK THAT HE HAS DONE IN THIS CASE. I HAVE AN OBLIGATION AS MUCH AS HE HAS TO REVIEW MATTERS, JUST LIKE THE APPELLATE COURTS HAVE TO DO WITH MATTERS THAT I RENDER, INCLUDING THIS PARTICULAR CASE.

BASED ON MY REVIEW, THESE ARE MY CONCLUSIONS:

NUMBER ONE, THE OPINION OF THE BANKRUPTCY JUDGE INSOFAR AS THE ISSUES RAISED BY THE APPELLANTS ON THIS APPEAL IS REVERSED.

BASED ON THE RECORD IN THIS CASE, THE COURT FINDS THAT SWEPCO AND CCM VIOLATED THE FOLLOWING PROVISIONS OF THE BANKRUPTCY CODE, AMONG OTHERS: SECTIONS 1125 IN THAT IT FAILED TO FULLY AND TRUTHFULLY DISCLOSE CERTAIN FACTS REGARDING THE ONE MILLION DOLLAR PAYMENT WHICH WAS MADE TO THE SEVEN MEMBERS: SECTION [12] 1123(A)(4) INSOFAR AS THE DISCRIMINATION AMONG MEMBERS. SECTION 1129(B)(2)(B) INSOFAR AS IT VIOLATES THE ABSOLUTE

PRIORITY RULE. SECTION 1129(A)(3) BECAUSE IT WAS AN IMPROPER PAYMENT AND CONCEALMENT OF FACTS. AND SECTION 1129(A)(4) BECAUSE SWEPCO FAILED TO GET PRIOR APPROVAL AND THE COURT BELIEVES THAT THE PAYMENTS WERE MADE FOR AN IMPROPER PURPOSE, NAMELY THE COURT BELIEVES THAT THIS WAS MADE AS A PRECONFIRMATION PAYMENT TO LOCK IN VOTES.

AND THE COURT STRONGLY DISAGREES WITH THE CONCLUSIONS REACHED BY THE BANKRUPTCY COURT INSOFAR AS THESE ISSUES ARE CONCERNED. AND THE COURT WILL SPELL OUT IN MORE DETAIL IN A FEW MOMENTS ITS CONCLUSIONS REGARDING THE VIOLATIONS OF THESE VARIOUS SECTIONS.

BECAUSE OF THE VIOLATIONS OF THE VARIOUS BANKRUPTCY CODES THAT THE COURT HAS ENUMERATED ABOVE, THE COURT FINDS THAT SWEPCO AND THE CCM CANNOT HAVE THEIR PLAN CONFIRMED. THEREFORE, IN DETERMINING THE APPROPRIATE REMEDIES, THE COURT FINDS THAT THE FOLLOWING REMEDIES WOULD BE APPROPRIATE IN THIS CASE:

ONE, THE PLAN SHOULD BE DISQUALIFIED, THE SWEPCO PLAN SHOULD BE DISQUALIFIED BECAUSE THERE WAS A NONDISCLOSURE, CONCEALMENT AND MULTIPLE VIOLATIONS OF THE BANKRUPTCY CODE. THE PLAN, THEREFORE, IS DISQUALIFIED BECAUSE OF SUCH CONDUCT AND ALSO BECAUSE THE PLAN IS [13] NOT CONFIRMABLE BECAUSE OF THE VARIOUS VIOLATIONS OF THE BANKRUPTCY CODE, AND SPECIFICALLY 1129.

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THE DISGORGEMENT ORDER SHALL BE ISSUED REQUIRING THE MEMBERS OF THE CCM WHO RECEIVED FUNDS TO RETURN THEM TO SWEPCO.

THE EXCLUSIONARY PROVISION THAT WAS SET FORTH IN THE AGREEMENTS MADE BETWEEN SWEPCO AND CCM WILL BE STRICKEN.

THE MANAGERS, ATTORNEYS AND A BOARD REPRESENTATIVE FROM EACH CCM WHICH RECEIVED MONEY FROM SWEPCO SHALL BE REQUIRED TO APPEAR IN COURT, PERSONALLY IN COURT, ON A DATE TO BE FIXED AT THE CONCLUSION OF THIS OPINION FOR THE COURT TO EXPLAIN ITS ACTIONS IN THIS CASE AND WHAT THE RIGHTS OF THE PARTIES ARE.

AND A COPY OF THE COURT'S OPINION AND REASONS FOR JUDGMENT SHALL BE SENT TO EACH CC MEMBER THROUGH ITS COUNSEL OF RECORD.

IN REACHING THE COURT'S DECISION THIS AFTERNOON, IT IS THE COURT'S INTENT TO SEND A STRONG MESSAGE TO SWEPCO, CCM AND ITS ATTORNEYS, BUT MORE IMPORTANT, TO ALL WHO ARE NOW BEFORE OR WHO WILL COME BEFORE THE BANKRUPTCY COURT IN THE FUTURE AND BEFORE THIS COURT ON ANY APPEALS OR BANKRUPTCY CASES THAT ARE HANDLED DIRECTLY BY THIS COURT, THAT THE CONDUCT WHICH THE [14] COURT HAS FOUND TO EXIST IN THIS CASE SHALL NOT BE AND CANNOT BE AND WILL NOT BE TOLERATED.

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THE WHOLE BASIS OF THE BANKRUPTCY CODE, AND INDEED FOR ANY COURT, IS TO OPERATE WITH TRUTHFULNESS, FULL DISCLOSURE AND EQUITABLE TREATMENT TO ALL.

WHAT HAS OCCURRED IN THIS CASE WAS LEGALLY, MORALLY AND ETHICALLY WRONG. PRECONFIRMATION PAYMENTS CANNOT BE TOLERATED. PAYMENTS WHICH CALL FOR LOCK-IN VOTES ARE ILLEGAL.

THE INTEGRITY OF THE CONFIRMATION PROCESS AND THE CONGRESSIONAL INTENT IN ENACTING THE BANKRUPTCY CODE REQUIRES FULL CANDOR, DISCLOSURE AND EQUITABLE TREATMENT TO ALL OF THE PARTIES INVOLVED IN THIS CASE, BOTH DEBTORS, CREDITORS, THE COURT AND OTHER INTERESTED PARTIES.

THE COURT IS ALSO CONCERNED THAT THERE MAY HAVE BEEN POSSIBLE VIOLATIONS OF FEDERAL AND STATE CRIMINAL LAWS INVOLVING THE ACTION OF ONE OR MORE PARTIES IN THIS CASE. THESE VIOLATIONS INCLUDE PERJURY, SUBORDINATION OF PERJURY, OBSTRUCTION OF JUSTICE, MAIL AND WIRE FRAUD AND POSSIBLE VIOLATIONS OF THE VARIOUS CRIMINAL BANKRUPTCY STATUTES.

I DON'T BELIEVE THE COURT WOULD BE CARRYING OUT ITS DUTIES IF IT DID NOT REQUEST THE UNITED STATES ATTORNEY FOR THE MIDDLE DISTRICT OF LOUISIANA TO [15] CONDUCT A CRIMINAL INVESTIGATION OF THIS MATTER TO SEE

IF ANY CRIMINAL LAWS HAVE BEEN VIOLATED. THEREFORE, THE COURT WILL REQUEST THAT A COPY OF ALL PAPERS, BRIEFS, TRANSCRIPTS AND OTHER DOCUMENTS FILED WITH THE COURT ON THIS APPEAL, BE GIVEN TO THE UNITED STATES ATTORNEY FOR THE MIDDLE DISTRICT OF LOUISIANA BY THE LOCAL UNITED STATES ATTORNEY WHO SIGNED THE PLEADINGS ON BEHALF OF THE RUS, WHICH WAS MR. BRIAN JACKSON. SO, MR. JACKSON SHOULD HAVE ALL OF THESE AND HE IS THE FIRST ASSISTANT UNITED STATES ATTORNEY FOR THE MIDDLE DISTRICT OF LOUISIANA.

SO I WOULD ASK THAT INSTEAD OF THE COURT HAVING TO GET ALL OF THESE RECORDS TOGETHER THAT — AND MR. JACKSON IS IN THE COURTROOM AS IS MR. HIPWELL AND YOU'RE HEARING WHAT I AM SAYING. SO YOU CAN LISTEN AND TAKE WHATEVER OTHER ACTION YOU MIGHT WANT TO TAKE. AND I DIDN'T KNOW YOU WERE HERE. IF I WOULD HAVE SEEN YOU, I WOULD HAVE DIRECTED MY COMMENTS STRAIGHT TO YOU.

THE COURT IS ALSO CONCERNED THAT THERE MAY HAVE BEEN VIOLATIONS OF THE CODE OF PROFESSIONAL RESPONSIBILITY, BOTH THE LOUISIANA AND THE AMERICAN BAR ASSOCIATION; THAT SUCH VIOLATIONS, IF ANY, SHOULD BE APPROPRIATELY REPORTED BY EITHER THE UNITED STATES ATTORNEY OR OTHER COUNSEL INVOLVED IN THIS CASE, [16] BECAUSE COUNSEL HAVE A DUTY, AS MUCH AS THE COURT, TO REPORT VIOLATIONS

THAT THEY BELIEVE MAY HAVE OCCURRED. AND TO NOT REPORT THESE VIOLATIONS IS A VIOLATION OF THE CODE AS I UNDERSTAND IT IN LOUISIANA.

THE COURT WILL NOW TURN TO MORE DETAILED DISCUSSIONS OF THE FACTS AND LAWS IN THIS CASE.

BY WHATEVER NAME YOU WANT TO CALL THE ONE MILLION DOLLAR PAYMENT IN THIS CASE, THE COURT BELIEVES THAT WHEN YOU REVIEW THE TESTIMONY PRESENTED TO THE BANKRUPTCY JUDGE, TOGETHER WITH ALL OF THE DOCUMENTARY EVIDENCE THAT WAS ALSO SUBMITTED, ONLY ONE CONCLUSION CAN BE REACHED, AND THAT IS THAT THE ONE MILLION DOLLAR PAYMENT WAS A PRECONFIRMATION PAYMENT THAT WAS CONCEALED, NOT ONLY FROM THE OTHER PLAN PROPONENTS WHICH HAPPENED TO BE OTHER, OR USED TO BE OTHER CCM MEMBERS, BUT WAS ALSO CONCEALED FROM PLAN PROPONENTS, FROM CREDITORS, FROM THE REGULATORY AGENCIES AND THE COURT.

I'M PARTICULARLY DISTURBED THAT THREE OF THE MEMBERS OF THE CCM, WHICH HAD BEEN MEMBERS BEFORE, WERE NOT EQUALLY ADVISED OF WHAT WAS GOING ON, PARTICULARLY SINCE THE LAWYER WHO REPRESENTED ALL TEN OF THEM WAS DIRECTLY INVOLVED IN THE PAYMENTS THAT WERE MADE IN THIS PARTICULAR CASE.

I PLACE PARTICULARLY HEAVY RELIANCE ON THE [17] DOCUMENTARY EVIDENCE PRESENTED IN

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THIS CASE, TOGETHER WITH A REVIEW OF THE TESTIMONY, WHEN REVIEWED IN THE CONTEXT IN WHICH THE WRITTEN DOCUMENTS WERE PREPARED AND SUBMITTED TO THE COURT, CLEARLY SHOW, IN MY OPINION, THAT THE OFFER OF PAYMENT WAS MADE VERY EARLY IN THESE PROCEEDINGS, NAMELY AS EARLY AS NOVEMBER, BEFORE THE VOTE ON THE PLAN WAS TAKEN. AND THE COURT NOTES ALSO THAT THE PAYMENTS OF AT LEAST $500,000 WERE MADE WELL BEFORE THIS SCHEME — AND THOSE ARE MY WORDS — WAS DISCLOSED TO OTHERS AND EVENTUALLY TO THE BANKRUPTCY COURT.

THE COURT BELIEVES THAT THE PAYMENT WAS MADE TO LOCK IN VOTES. THE COURT BELIEVES THAT THE PAYMENT CANNOT BE ENTITLED OR CALLED A TRANSITION PAYMENT BECAUSE, IN EFFECT, THE PURPOSE OF THE PAYMENT WAS TO SECURE THE VOTES OF THE CCM MEMBERS WHO RECEIVED THESE PAYMENTS, TO OBTAIN THEIR EXCLUSIVE SUPPORT FOR THE SWEPCO PLAN, AND FAILURE TO DO SO WOULD HAVE RESULTED IN A PENALTY TO THOSE MEMBERS WHO DID NOT GIVE EXCLUSIVE SUPPORT TO THE SWEPCO PLAN BY REQUIRING THEM TO RETURN MONEY. THERE IS NO OTHER WAY IN READING THE DOCUMENTS THAT ANY OTHER CONCLUSION CAN BE MADE.

THE PAYMENTS, AS I SAID EARLIER, WERE NOT TRANSITION COSTS AS THE APPELLEES CONTEND, BUT THE COURT BELIEVES THESE PAYMENTS WERE PRECONFIRMATION [18] PAYMENTS MADE TO LOCK IN VOTES.

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THE DOCUMENTS ADMITTED INTO EVIDENCE, WHEN CONSIDERED WITH THE TESTIMONY PRESENTED TO THE BANKRUPTCY COURT, SHOWS THAT THE FACTUAL FINDINGS MADE BY THE BANKRUPTCY JUDGE WERE CLEARLY ERRONEOUS UNDER THE FACTS OF THIS CASE.

THE COURT FURTHER FINDS THAT THE BANKRUPTCY COURT ERRED AS A MATTER OF LAW AND FACT IN REFUSING TO DISQUALIFY SWEPCO AND ORDER DISGORGEMENT OF PAYMENTS PREVIOUSLY MADE.

THE COURT ALSO FINDS THAT THE BANKRUPTCY COURT ERRED IN FAILING TO DISCUSS IN ITS OPINION OTHER LEGAL ARGUMENTS MADE BY THE APPELLANTS, WHICH THE COURT WILL CONSIDER DE NOVO ON THIS APPEAL.

IT IS CLEAR THAT, WHILE THE BANKRUPTCY COURT REFERRED TO THE TESTIMONY OF MANY WITNESSES WHO HAD TESTIFIED, THAT THE TESTIMONY HAS TO BE READ IN CONJUNCTION WITH THE WRITTEN DOCUMENTS.

NOW, THERE WERE SEVERAL ISSUES RAISED IN THIS CASE. ONE, WHETHER OR NOT THERE IS A VIOLATION OF 11 UNITED STATES CODE, SECTIONS 1129(A)(1) AND (2) WHICH REQUIRE THE PLAN AND THE PLAN PROPONENT TO COMPLY WITH ALL BANKRUPTCY CODE PROVISIONS, AND IN PARTICULAR, COMPLIANCE WITH THE DISCLOSURE DEMANDS OF 11 UNITED STATES CODE SECTION 1125.

[19] TWO, THERE IS AN ISSUE OF WHETHER OR NOT THERE IS A VIOLATION OF 11 UNITED STATES CODE SECTION 1129(A)(3) WHICH DEMANDS GOOD FAITH.

THIRD, THERE IS AN ISSUE OF WHETHER OR NOT THERE WAS A VIOLATION OF 11 UNITED STATES CODE SECTION 1129(A)(4) WHICH REQUIRES COURT APPROVAL OF A PAYMENT BY A PERSON ACQUIRING PROPERTY UNDER A PLAN OR A PLAN PROPONENT.

AND FIVE — OR FOUR, I SHOULD SAY, VIOLATING 11 UNITED STATES CODE SECTION 1129(B), THE ABSOLUTE PRIORITY RULE AND 11 UNITED STATES CODE SECTION 1123(A)(4), DISCRIMINATING AMONG SIMILAR SITUATED CREDITORS, WHICH IS INCORPORATED INTO SECTION 1129(A)(1) AND (2), BY PAYING TO CERTAIN MEMBERS, BUT NOT THE EXPELLED MEMBERS OR OTHER UNSECURED CREDITORS OF THE ESTATE, THE FULL VALUE OF THEIR CLAIMS.

THESE ARE THE CORE ISSUES IN THIS CASE. AND THE CORE ISSUES IN THIS CASE, NO MATTER HOW YOU LOOK AT IT, ALL POINT TO THE FACT THAT THERE WAS CONCEALMENT, THERE WAS A PAYMENT, THERE WAS LACK OF COURT APPROVAL, THERE WAS LACK OF CANDID RESPONSES TO REGULATORY AGENCIES, THERE WAS SIMPLY A CLEAR VIOLATION OF EVERYTHING THAT A BANKRUPTCY COURT SHOULD AND MUST REQUIRE IN A CONFIRMATION PROCEEDING, PARTICULARLY ONE THAT AFFECTS THE PUBLIC INTERESTS AS THIS CASE DOES.

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[20] THERE ARE SEVERAL — THERE ARE MANY DOCUMENTS IN THIS CASE. AND MANY DOCUMENTS WERE DISCUSSED TODAY AND MANY DOCUMENTS WERE SET FORTH IN THE BRIEFS. BUT THERE ARE SEVERAL DOCUMENTS WHICH THE COURT BELIEVES ARE PARTICULARLY IMPORTANT AND THE LANGUAGE CONTAINED THEREIN ARE PARTICULARLY IMPORTANT.

AND BEFORE I LIST THE DOCUMENTS, YOU KNOW, IT'S PRETTY WELL SETTLED IN THE SUPREME COURT AGAIN IN AN OPINION RELEASED ON MONDAY REGARDING THE APPLICABILITY OF AMERICANS WITH DISABILITIES ACT, TO PRISONS, ALWAYS COMES BACK TO THE ISSUE THAT WHERE THE LANGUAGE OF A STATUTE IS CLEAR, OR THE LANGUAGE OF A CONTRACT IS CLEAR, OR THE LANGUAGE OF A DOCUMENT IS CLEAR, THE COURT HAS TO GIVE CLEAR MEANING TO THAT PARTICULAR STATUTE OR DOCUMENT OR WHAT HAVE YOU.

SEVERAL DOCUMENTS WERE INTRODUCED INTO THE RECORD. COUNSEL DISCUSSED THEM THIS MORNING, BUT AS PART OF THE OPINION, THE COURT HAS TO EMPHASIZE THE IMPORTANCE OF THE FOLLOWING DOCUMENTS THAT THE COURT HAS THOROUGHLY READ AND DEEMED VERY IMPORTANT IN THIS PARTICULAR CASE.

THESE DOCUMENTS ARE THE NOVEMBER 13, 1996, MEMO OF DAVID KLEIMAN AND THE LETTER ATTACHED THERETO. THE JANUARY 7, 1997, LETTER WRITTEN THE DAY THAT THE BANKRUPTCY COURT

DISQUALIFIED MR. KLEIMAN. THE SWEPCO [21] TERM SHEETS DATED APRIL 17, 1997. THE JOINT REPORT FILED ON APRIL 17, 1997, DEALING WITH THE ACCELERATION OF PAYMENTS.

WHEN YOU LOOK AT THE SPECIFIC LANGUAGE OF THESE PARTICULAR LETTERS OR DOCUMENTS OR PLEADINGS FILED WITH THE COURT, ALL COME TO ONE CONCLUSION, THAT IF THE CCM MEMBERS WANTED TO KEEP THE MONEY, AND TO GET THE MONEY, ONE, THEY HAD TO GIVE EXCLUSIVE SUPPORT TO THE SWEPCO PLAN — WHICH WAS ALSO SUPPOSEDLY THEIR CO-PLAN — AND, TWO, THEY WERE NOT ALLOWED TO CHANGE THEIR VOTE OR TO DO ANYTHING ELSE WITHOUT CERTAIN CONDITIONS ATTACHED, MANY OF WHICH WERE ALMOST IMPOSSIBLE TO ACHIEVE, BUT NONE, GIVEN THE MEANING THAT COUNSEL FOR APPELLEES WANTS THE COURT TO ACCEPT, AND WHICH APPARENTLY HE WAS ABLE TO GET THE BANKRUPTCY COURT TO AGREE WITH.

I THINK WHEN THE LETTER SAYS "AND" IT MEANS AND, IF IT SAYS "OR" IT MEANS OR, AND YOU CAN'T CHANGE THE MEANING.

AND MANY OF THESE LETTERS SUGGEST TO THE COURT THAT IN NOVEMBER OF 1996 THERE WERE NEGOTIATIONS ALREADY BEGUN TO HAVE PRECONFIRMATION PAYMENTS GIVEN TO CCM MEMBERS. AND THEN WHEN THE COURT DISQUALIFIED MR. KLEIMAN THINGS HAPPENED THAT DISTURB THE COURT IN MORE WAYS THAN JUST RESOLVING THE ISSUE ON THIS [22] APPEAL.

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FRANKLY, I DON'T KNOW HOW COUNSEL COULD HAVE CONTINUED TO REPRESENT ANYBODY AT THAT TIME, AND FRANKLY, I THINK THE ACTIONS TAKEN WERE IN FURTHERANCE OF A CONFIRMATION PLAN THAT THE BANKRUPTCY COURT EARLY IN THE DAY HAD SAID COULD NOT BE DONE.

SOME OF THE PAYMENTS THAT WERE PROMISED TO THE CCM'S INCLUDED PAYMENTS TO BE PAID FOR PRIOR SERVICES RENDERED BY MR. KLEIMAN AND HIS FIRM.

BUT THE LETTER IN THE JANUARY 7 MEMO ALSO DOES SOMETHING ELSE. WHEN IT SAYS THE PAYMENTS ARE GOING TO BE MADE, NEVER IS THE FACT THAT THERE WILL BE PAYMENTS MADE DISCLOSED TO THE BANKRUPTCY COURT. NEVER WAS THERE PRIOR APPROVAL. NEVER WAS THERE ANY DISCLOSURE TO ANY OTHER CREDITOR, TO THE TRUSTEE, AND ONLY WHEN, BY CHANCE SOMEONE FROM CCM MADE A MISTAKE AND DISCLOSES THE FACT THAT PAYMENTS ARE BEING MADE, ONLY THEN IS THERE SOME DISCLOSURE THAT MONEY HAD BEEN PAID.

I DO NOT BELIEVE THAT ANY OF THE DOCUMENTS FILED WITH THE COURT EARLIER CONSTITUTE THE FULL DISCLOSURE THAT THE BANKRUPTCY COURT HELD TO BE SUFFICIENT, OR THAT APPELLEES ON APPEAL REQUEST THIS COURT TO SAY WERE SUFFICIENT.

I DON'T THINK THE PURPOSE OF THE BANKRUPTCY CODE [23] STATUTES, WHICH REQUIRE

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FULL DISCLOSURE, SHOULD REQUIRE THE COURT OR A PARTY OR A TRUSTEE OR A DEBTOR OR A CREDITOR OR ANYBODY ELSE TO HAVE TO SEARCH FOR MEANING OF LANGUAGE.

IT IS TOO EASY FOR A PARTY TO DISCLOSE THAT A $500,000 PAYMENT HAS ALREADY BEEN MADE AND ADDITIONAL $500,000 PAYMENTS WILL BE MADE. IT IS TOO EASY FOR A PARTY TO GO TO A COURT AND ASK THAT THE PAYMENTS BE APPROVED AS THE BANKRUPT CODE REQUIRES.

IT IS EQUALLY DISTURBING TO THE COURT THAT SLEMCO, POINTE COUPEE AND CONCORDIA, WHO HAD EARLIER ABANDONED THE SWEPCO PLAN, WERE NOT TOLD, EVEN THOUGH A LAWYER WHO WAS INVOLVED IN THE PLANNING OF THESE PAYMENTS HAD PREVIOUSLY REPRESENTED THEM AND IN MY OPINION WAS STILL THEIR COUNSEL OF RECORD, OR AT LEAST COUNSEL THAT, EVEN AT THE HEARING BEFORE THE BANKRUPTCY JUDGE, COUNSEL AT THAT HEARING WERE TRYING TO PROTECT ON THE BASIS OF ATTORNEY/CLIENT PRIVILEGE.

IT IS DISTURBING THAT THEY RECEIVED NO NOTICE, NONE OF THE MONEY, EVEN THOUGH THEY WERE PREVIOUSLY INVOLVED AS ONE OF THE CCM'S IN THIS PARTICULAR CASE.

I THINK WHEN YOU REVIEW THE RECORDS SUCH AS THE JANUARY 7TH LETTER THAT CONTAINS LANGUAGE SUCH AS, "IN THE EVENT ANY MEMBER SUPPORTS ANOTHER PLAN OR RECEIVES

REIMBURSEMENT FROM ANY OTHER PROPONENT, THEN THE [24] MEMBER AGREES TO PAY BACK THE MONEY." THAT IS A CLEAR INDICATION TO THE COURT THAT THESE PEOPLE ARE LOCKED IN AND THESE PEOPLE CAN'T SUPPORT ANY OTHER PLAN WITHOUT RETURNING THIS MONEY.

THAT IS FAR FROM SAYING THAT THESE MONIES CAN IN ANY WAY BE TRANSITION COSTS.

I THINK WHEN YOU LOOK AT THE LANGUAGE IN SOME OF THE DOCUMENTS WHICH SAY THAT WE WILL ACCELERATE PAYMENTS, SUCH AS THE APRIL 17, 1997, LETTER, IT'S PRETTY WELL AN INDICATION THAT THE — WHAT THE INTENT OF THE PARTIES WERE INSOFAR AS PAYING THESE PEOPLE AND FRANKLY, PAYING THEM OFF IN RETURN FOR THEIR VOTE. CAN'T SAY IT ANY OTHER WAY. AND THAT'S THE WAY THAT I THINK THIS MATTER HAS TO BE LOOKED AT.

MR. KLEIMAN NEVER TESTIFIED AT THIS HEARING. BOTH SIDES GIVE REASONS WHY HIS TESTIMONY WAS NOT SUBMITTED.

THE COURT BELIEVES THAT HIS TESTIMONY WOULD HAVE BEEN VERY IMPORTANT. AND I FRANKLY DON'T SEE HOW THE APPELLEES CAN RELY ON WHAT MR. KLEIMAN DID IN LETTERS THAT HE WROTE, AND AT THE SAME TIME FAIL TO DISCLOSE IN ITS ENTIRETY THINGS THAT SHOULD HAVE BEEN DISCLOSED AT THE BANKRUPTCY COURT LEVEL.

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THE PROBLEM WITH ME GETTING TOO INVOLVED IN THIS PARTICULAR ISSUE IS THAT DURING THE BANKRUPTCY COURT [25] HEARING, NONE OF THE DOCUMENTS WERE PRESERVED UNDER SEAL FOR THE COURT TO REVIEW INSOFAR AS THE RESPONSE DOCUMENTS, FOR EXAMPLE, THAT WERE REVIEWED BY THE BANKRUPTCY JUDGE IF, IN FACT, HE REVIEWED THEM. IT DEPENDS ON WHICH COUNSEL YOU BELIEVE TODAY.

BUT THE FACT OF THE MATTER IS, THE COURT BELIEVES THAT THE DISQUALIFICATION OF MR. KLEIMAN LED TO THE MATTERS THAT ARE NOW BEFORE THE COURT. AND I CAN HARDLY BELIEVE THAT THE MATTERS HERE WERE TRANSITION PAYMENTS.

I ALSO DON'T UNDERSTAND HOW, IN RESPONSE TO QUESTIONS ASKED BY THE LOUISIANA PUBLIC SERVICE COMMISSION, AND YOU CAN TAKE THAT TRANSCRIPT AND YOU CAN READ IT AS CLOSELY AS YOU WANT TO READ IT, I DON'T UNDERSTAND HOW REPRESENTATIVES OF SWEPCO COULD NOT AND DID NOT DISCLOSE TO THE PSC WHETHER OR NOT SWEPCO WAS GOING TO REIMBURSE MEMBERS EXPENSES OR THAT $500,000 HAD ALREADY BEEN PAID.

I MENTION THIS BECAUSE THE APPELLEES SAY THE BANKRUPTCY JUDGE SAW THE WITNESSES AND HE SAW THE WITNESSES' CREDIBILITY AND OBSERVED THE WITNESSES WHEN THEY TESTIFIED, BUT YOU DON'T NEED TO SEE A WITNESS TO REVIEW

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TESTIMONY THAT OCCURRED BEFORE ANOTHER BODY. AND THE SAME PATTERN OF CONDUCT THAT BEGAN IN THE BANKRUPTCY CASE AS EARLY AS NOVEMBER, IN THE COURT'S [26] OPINION, CONTINUED IN MARCH WHEN THE PARTIES APPEARED BEFORE THE PUBLIC SERVICE COMMISSION, APPEARED LATER — CONTINUED LATER UNTIL THE MONIES HAD BEEN PAID AND THEN THE TERM SHEET IS DISCLOSED ON APRIL 17, 1997.

FOR SOMEBODY TO TELL THE COURT THAT THE MILLION DOLLARS WAS PAID FOR NOTHING, OR THE MILLION DOLLARS WAS TRANSITION COSTS WHEN, FRANKLY, NOT EVEN THE BANKRUPTCY JUDGE BELIEVED THAT IN A SUBSEQUENT HEARING WHEN HE WAS TRYING TO DETERMINE PRO NUNC TUNC WHETHER OR NOT THE PAYMENTS SHOULD HAVE BEEN — THE AMOUNT SHOULD HAVE BEEN APPROVED.

I MEAN, IT'S PRETTY OBVIOUS TO THE COURT, WHEN YOU LOOK THROUGH THE TESTIMONY, THAT PEOPLE WERE USING MONEY FOR ALL SOURCES AND IT WASN'T JUST TRANSITION COSTS AS COUNSEL HAS ATTEMPTED TO HAVE THIS COURT BELIEVE.

THE COURT ALSO MAKES THE FOLLOWING ADDITIONAL FINDINGS: REGARDING THE APPLICABILITY OF CERTAIN STATUTES IN THIS CASE:

NUMBER ONE, I HAVE TO AGREE WITH THE TRUSTEE THAT THIS IS NOT A RATE CASE. EVERYBODY WANTS GOOD RATES. AND I KNOW THAT

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SWEPCO IS PROBABLY SINCERE IN ITS DESIRE TO OBTAIN THE BEST RATES IT CAN FOR THE PEOPLE THAT IT SERVES, BUT THAT'S NOT THE ISSUE IN THE [27] BANKRUPTCY CASE.

THE ISSUE IN THE BANKRUPTCY CASE IS WHETHER OR NOT CREDITORS WHO HAVE LEGITIMATE PAYMENTS AND CREDITORS WHO HAVE SPECIFIC RANKING WILL BE PROPERLY PAID FROM ANY ASSETS THAT MIGHT BE AVAILABLE IN THIS PARTICULAR CASE.

IT IS TRUE THAT THE RATES, IF YOU LOOK AT THE DOCUMENTS FILED WITH THE COURT, THERE IS NO DISAGREEMENT THAT THE RATES IN THIS CASE WERE PARTICULARLY — HAVE GONE DOWN SUBSTANTIALLY FROM WHEN THE COURT FIRST GOT THIS CASE — WHEN THE BANKRUPTCY CASE BEGAN AND EVEN WHEN THE COURT HEARD THE CAJUN/ GULF STATES MATTER.

BUT THIS IS NOT A RATE CASE AND THIS IS NOT AN ISSUE BEFORE THE COURT TODAY AS TO WHETHER OR NOT THE ENRON PLAN OR THE TRUSTEE'S PLAN, RECOMMENDED PLAN, IS THE PROPER PLAN. THAT'S NOT AN ISSUE BEFORE THE COURT.

IF COUNSEL FOR APPELLEES BELIEVE THAT THE OTHERS HAVE BEEN INVOLVED IN CONDUCT THAT WOULD DISQUALIFY THOSE RESPECTIVE PLANS, THAT MATTER SHOULD BE PRESENTED TO THE BANKRUPTCY COURT. AND THE BANKRUPTCY

COURT, IN DETERMINING WHETHER OR NOT THE PROVISIONS OF 1129 HAVE BEEN SATISFIED, CAN THEN INVOLVE ITSELF AND CONCERN ITSELF WITH WHETHER OR NOT ANY OF THE [28] REMAINING PLANS ARE PROPER.

BUT I FIND THAT THE BANKRUPTCY COURT ERRED IN FINDING THAT THE SWEPCO PAYMENT WAS NOT IN EXCHANGE FOR EXCLUSIVITY. YOU KNOW, I'LL CONCEDE THAT CREDIBILITY ISSUES ARE LEFT FOR THE TRIAL COURT, BUT I HAVE TO AGREE WITH WHAT COUNSEL FOR THE TRUSTEE WROTE ON PAGE 32 OF HIS BRIEF, THAT NAMELY DOCUMENTS SPEAK LOUDER THAN WORDS.

IT'S DIFFICULT FOR ME TO FIND THAT OR TO AFFIRM THE DECISION OF THE BANKRUPTCY COURT WHEREIN HE SAID THERE WAS NO CREDIBLE EVIDENCE TO SUGGEST THAT THE SWEPCO PAYMENT CARRIED A QUID PRO QUO WHEN I REVIEW THE DOCUMENTS THAT WERE MENTIONED EARLIER.

I ALSO HAVE TO AGREE WITH WHAT THE TRUSTEE SAID IN THAT — AND I SAY TRUSTEE, I'M SPEAKING FOR ALL THE APPELLEES, THAT ACTIONS SPEAK LOUDER THAN WORDS BECAUSE MONIES WERE PAID AND QUIET FRANKLY, MONIES WERE PAID FOR A SPECIFIC REASON.

AND I DON'T KNOW WHY DIFFERENT TERM SHEETS WERE SET FORTH DIFFERENTLY. I DON'T KNOW WHY ALL THE MEMBERS OF THE CCM WHO HAD AT LEAST SOME FIDUCIARY RELATIONSHIP

WITH MR. KLEIMAN AND THE OTHER MEMBERS OF HIS FIRM, WERE NOT AWARE OF THE FACT THAT THESE PEOPLE COULD GET TRANSITION COSTS AND POSSIBLY, THEREFORE, WOULD WANT TO COME ON BOARD.

[29] THERE WAS NO DISCUSSION OF THAT. THE MERE FACT THAT THEY CHOSE TO SUPPORT SOME OTHER PLAN IMMEDIATELY CAUSED THEM TO LOSE OUT ON ANY PAYMENTS.

BUT THIS IS ONE OF THE REAL CONCERNS THAT I HAVE. THE BANKRUPTCY COURT SAID, WELL, THE VOTING OCCURRED EARLIER, BEFORE THE MONEY HAD ACTUALLY BEEN PAID. AS I SAID EARLIER, I THINK THE ARRANGEMENTS FOR THE PAYMENTS OCCURRED PRIOR TO THE VOTING. BUT EVEN IF, ASSUME THE BANKRUPTCY JUDGE IS CORRECT IN HIS ASSUMPTION THAT THE VOTING OCCURRED PRIOR TO THE PAYMENTS, THE FACT OF THE MATTER IS, THESE PEOPLE WHO RECEIVED THE PAYMENTS STILL ARE LOCKED IN. THEY STILL CAN'T CHANGE OR MOVE AWAY FROM THEIR VOTE UNLESS CERTAIN THINGS OCCUR. AND IF ANY OF THESE THINGS OCCUR, THEN THEY HAVE TO REFUND THE MONEY.

SO I THINK THE EFFECT OF LOCKING THESE PEOPLE IN IS THE SAME, NO MATTER WHAT. BECAUSE IT IS TRUE THAT PEOPLE CAN FILE A MOTION TO CHANGE VOTES, BUT PEOPLE FILING MOTIONS TO CHANGE VOTES UNDER THE CONDITIONS THAT THE MONEY WAS OBTAINED IN THIS PARTICULAR CASE ARE FRANKLY GOING TO HAVE TO COME UP WITH

SOME MONEY. BUT IN THE FINAL ANALYSIS, THE CCM MEMBERS ARE GOING TO HAVE TO REIMBURSE THE MONEY ANYHOW BECAUSE THAT'S THE COURT'S RULING TODAY.

SO, WE COME TO THE VARIOUS STATUTES THAT WERE [30] INVOLVED IN THIS PARTICULAR CASE AND I DON'T THINK IT'S NECESSARY FOR THE COURT TO REPEAT MUCH OF THIS EXCEPT TO SAY THIS: I THINK APPELLEES ARE CORRECT WHEN THEY SAY THAT THERE WAS NOT FULL DISCLOSURE IN THIS PARTICULAR CASE. I THINK THE BANKRUPTCY COURT WAS WRONG WHEN IT FOUND THAT THE SECOND SENTENCE IN THE SWEPCO DISCLOSURE STATEMENT PLACED ALL PARTIES ON NOTICE OF THE POSSIBILITY — AND IT HAS "THE" BUT IT PROBABLY SHOULD HAVE BEEN "THAT" PAYMENT OF ADDITIONAL FUNDS MAY BE NEGOTIATED. AND THE BANKRUPTCY COURT FURTHER HELD THAT I DON'T BELIEVE THAT THIS SECOND SENTENCE OF THE DISCLOSURE STATEMENT SHOULD BE NARROWLY CONSTRUED. BUT I DON'T SEE HOW YOU CAN READ THIS PARTICULAR LANGUAGE IN ANYWAY OTHER THAN WHAT IS IN THE DOCUMENT.

AS I SAID EARLIER, I DON'T THINK IN BANKRUPTCY CASES COURTS SHOULD HAVE TO GUESS OR HINTS SHOULD BE SUFFICIENT OR IT'S GOING TO BE A PLAY ON WORDS AS TO WHETHER OR NOT THERE HAS BEEN A FULL DISCLOSURE. THE STATUTE SAYS FULL DISCLOSURE.

THE INTENT OF THE BANKRUPTCY LAW IS THAT EVERYBODY BE TREATED EQUALLY. AND IN THIS

PARTICULAR CASE THE PEOPLE THAT SWEPCO PAID HAD A PARTICULAR UNIQUE POSITION IN THIS PARTICULAR CASE.

THEY MAY HAVE BEEN PRO PROPONENTS OF A PLAN BUT [31] THEY HAD EQUITY STANDING AND, IN ADDITION, THEY WERE CREDITORS. AND IN RECEIVING THE AMOUNT OF MONEY THAT THEY RECEIVED IN THIS CASE, WHICH COINCIDENTALLY COMES TO APPROXIMATELY THE AMOUNT OF MONEY THAT THEY HAD AS CREDITORS IN THIS PARTICULAR CASE, SEEMS TO GIVE THESE PEOPLE AN ADVANTAGE THAT OTHER PEOPLE DID NOT HAVE.

AND IT MATTERS NOT TO ME THAT THE UNITED STATES IS THE LARGEST CREDITOR IN THIS CASE. THE UNITED STATES IS ENTITLED TO THE SAME RIGHTS AS ANY OTHER CREDITOR. WHETHER IT WAS A GOOD DECISION OR BAD DECISION IN LENDING THE MONEY IS NOT IMPORTANT. WHETHER OR NOT THE TAXPAYERS CAN ABSORB THE DEBT IS NOT IMPORTANT. THE FACT OF THE MATTER IS, THE UNITED STATES, UNDER THE RUS, HAS A LEGAL STANDING AND A SECURED POSITION IN THIS CASE. AND THEIR STANDING AND THEIR POSITION SHOULD BE PROTECTED AS ANY OTHER CREDITOR. AND WHETHER OR NOT 700,000 OR ONE MILLION DOLLARS WOULD HAVE DONE ANYTHING TO RETIRE DEBT THAT'S IN EXCESS OF $4 BILLION IS NOT THE ISSUE. THE ISSUE IS WHAT'S PROPER. AND I DON'T THINK WHAT HAPPENED IN THIS CASE WAS PROPER.

I GO TO THE FINAL PORTION OF THE OPINION THAT I WANT TO DICTATE IN OPEN COURT THIS

AFTERNOON AND THIS DEALS WITH FAILURE TO DISCLOSE AND WHETHER OR NOT SUCH FAILURE TO DISCLOSE VIOLATES SECTION 1129(A)(2).

[32] WHEN ONE OF THE COUNSEL WHO ARGUED THE CASE ON BEHALF OF THE APPELLANTS TODAY STOOD UP, SHE HAD THIS BIG CHART AND WE LATER GOT A COPY OF THE OPPORTUNITIES THAT SWEPCO HAD TO DISCLOSE TO THE COURT. AND I LOOK AT THE SHEET, WHICH IS APPELLANTS NUMBER SIX FOR THE RECORD, AND THE DATES GO BACK TO NOVEMBER 12, 1996, ALL THE WAY THROUGH APRIL 17, 1997. AND I FIND THAT THERE WAS MORE THAN AMPLE OPPORTUNITY FOR SWEPCO TO MAKE A PROPER DISCLOSURE.

AND THE REASON FOR THIS IS THAT THE CONGRESS INTENDED THAT THERE BE COMPLIANCE WITH DISCLOSURE AND COMPLIANCE WITH SOLICITATION AGREEMENTS. I HAVE TO AGREE WITH ONE OF THE LAWYERS WHO ARGUED TODAY, IF THE CONDUCT SUCH AS THAT WHICH OCCURRED IN THIS CASE IS ALLOWED TO CONTINUE, EVERY CONFIRMATION PLAN AROUND IN CASES OF THIS NATURE WILL BE A REAL BIDDING PROCESS AND THE QUESTION IS, WHO CAN GET THE MOST FROM WHOM AND, THEREFORE, CREDITORS AND DEBTORS AND OTHER INTERESTED PARTIES ARE GOING TO BE LEFT TO THE HIGHEST BIDDER STANDARD. AND THIS IS NOT WHAT THE CONGRESS INTENDED WHAT IT EXACTED THE VARIOUS STATUTES INVOLVED IN THIS PARTICULAR CASE.

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AND I THINK THAT WHEN MATTERS ARE DISCLOSED, THEY SHOULD BE DISCLOSED CLEARLY, FULLY AND PROMPTLY. AND TO RELY ON WHAT WAS DISCLOSED IN THIS CASE, EVEN AT [33] THE TIME IT WAS DISCLOSED, AT BEST IT MIGHT BE A HINT BUT UNLESS YOU KNEW ALL THE FACTS SURROUNDING WHAT THE HINT WAS ABOUT, YOU FRANKLY DID NOT KNOW WHAT, IN FACT, HAD BEEN DONE AND WHETHER OR NOT THERE HAD BEEN CONCEALMENT OF PAYMENTS MADE IN THIS PARTICULAR CASE.

AND, BECAUSE THERE HAS BEEN A FAILURE TO PROPERLY DISCLOSE AS REQUIRED BY 1129(A)(2), THEN I DON'T THINK THE SWEPCO PLAN AS A MATTER OF LAW CAN BE CONFIRMED. AND BECAUSE CERTAIN MEMBERS OF — REALLY DEBTORS — I MEAN, CERTAIN CREDITORS HAVE BEEN PAID, NAMELY THE CCM'S, THEY HAVE BEEN PAID WHILE OTHERS HAVE NOT BEEN PAID, I THINK THAT IS A VIOLATION OF 1123(A)(4). AND, THEREFORE, THIS IS AN ADDITIONAL REASON WHY THIS PLAN HAS TO BE DISQUALIFIED.

AND I THINK NON-DISCLOSURE OR MISLEADING DISCLOSURE, IN MY OPINION, IS STRONG EVIDENCE OF BAD FAITH. AND WHERE THERE IS BAD FAITH, THERE CAN'T BE A COMPLIANCE WITH 1129(A)(3).

AND I CANNOT SAY AS A MATTER OF LAW THAT THE ACTIONS TAKEN IN THIS PARTICULAR CASE BY SWEPCO AND CCM'S CAN BE ANYTHING BUT BAD FAITH UNDER THE FACTS OF THIS PARTICULAR CASE.

THAT BRINGS THE COURT, I BELIEVE, TO A COUPLE OF FINAL THINGS AND THAT IS WHETHER OR NOT THERE WAS COMPLIANCE WITH SECTION 1129(A)(4). 1129(A)(4) IS [34] IMPORTANT IN THIS CASE BECAUSE IT SAYS, "ANY PAYMENT MADE OR TO BE MADE BY THE PROPONENT, BY THE DEBTOR OR BY A PERSON ISSUING SECURITIES OR ACQUIRING PROPERTY UNDER THE PLAN, FOR SERVICES OR FOR COSTS AND EXPENSES IN OR IN CONNECTION WITH THE CASE OR IN CONNECTION WITH THE PLAN AND INCIDENT TO THE CASE, HAS BEEN APPROVED BY OR IS SUBJECT TO THE APPROVAL OF THE COURT AS REASONABLE."

NOW, IN THIS PARTICULAR CASE THE BANKRUPTCY COURT HELD THAT SECTION 1129(A)(4) APPLIED AND I'VE ALREADY AFFIRMED THAT DECISION. WHAT I DISAGREE WITH THE BANKRUPTCY COURT ON IS THE FACT THAT YOU CAN GET LATER APPROVAL OF PAYMENTS PREVIOUSLY MADE. I DON'T THINK THAT'S PERMITTED AS A MATTER OF LAW IN THIS CASE AND I DON'T THINK IT'S THE ROLE OF THE DISTRICT COURT. AND MY PRIOR HISTORY ON THIS IS PRETTY CLEAR. I THINK THE ROLE OF THE DISTRICT COURT OR THE BANKRUPTCY COURT IS TO BE JUDGES. AND IF THE LEGISLATURE WANTS LANGUAGE IN 1129(A)(4) WHICH WOULD SAY THAT THIS APPROVAL CAN BE MADE LATER AFTER THE PAYMENT IS MADE, THEN LET — THE CONGRESS, I SHOULD SAY, SHOULD BE ONE TO WRITE THAT LANGUAGE IN, AND I'M NOT GOING TO WRITE IT IN BECAUSE I THINK 1129(A)(4) HAS A SPECIFIC PURPOSE, THAT A PLAN CANNOT

CONFIRMED UNLESS THE BANKRUPTCY COURT HAS APPROVED PAYMENTS PREVIOUSLY MADE, BUT THEY [35] HAVE TO BE APPROVED AT THE TIME THAT THESE PAYMENTS WERE MADE AND THEY HAD TO BE APPROVED BY THE BANKRUPTCY COURT. AND IF PAYMENTS ARE GOING TO BE MADE IN THE FUTURE, THEY'VE GOT TO HAVE COURT APPROVAL.

SO, I DON'T THINK 1129(A)(4) CAN BE READ IN ANY WAY SUCH THAT IF YOU WANT TO PAY SOMEBODY, YOU'VE GOT TO GET COURT APPROVAL. IF YOU'RE GOING TO PAY THEM IN THE FUTURE, YOU'VE GOT TO GET COURT APPROVAL. BUT I DON'T THINK YOU CAN DO IT PRO NUNC TUNC, JUST SAYING, WELL, WE'LL JUST GO BACK AND IF YOU DID IT, THEN WE'LL GO BACK AND SEE IF IT WAS OKAY AND THE AMOUNT IS REASONABLE. I THINK THAT VIOLATES THE INTENT AND MEANING OF 1129(A)(4) AND THAT'S WHY I THINK AS A MATTER OF LAW THE BANKRUPTCY COURT ERRED IN ITS CONCLUSION THAT YOU COULD HAVE THIS APPROVED PRO NUNC TUNC.

SO, WHEN I LOOK AT ALL THESE VIOLATIONS IN THIS CASE, IT BRINGS ME TO WHAT IS THE PROPER REMEDY. AND I HAVE ALREADY STATED MY FEELINGS ABOUT THE CONDUCT IN THIS CASE. THERE IS NO NEED FOR ME TO REPEAT THOSE, BUT I THINK AS A MATTER OF LAW THAT THE PLAN IS NOT — CANNOT BE QUALIFIED AS A MATTER OF LAW BECAUSE OF THE VIOLATIONS MADE.

I THINK BECAUSE OF THE CONDUCT IN THIS CASE, THE [36] CONCEALMENT, THE LACK OF GOOD FAITH,

ANY SANCTION LESS THAN DISQUALIFICATION WOULD NOT BE IN THE INTEREST OF JUSTICE. SO, THE COURT, AS I NOTED EARLIER, WILL DISQUALIFY THE SWEPCO PLAN.

I THINK DISGORGEMENT IS REQUIRED IN THIS CASE BECAUSE I DON'T THINK I CAN LET THE CCM MEMBERS WHO KNEW ABOUT THESE PAYMENTS, WHO HAD ATTORNEYS REPRESENT THEM, SHOULD BE ALLOWED TO REAP THE BENEFIT OF A MISTAKE MADE JOINTLY WITH SWEPCO.

IT'S PRETTY CLEAR THAT ONE OF THE CCM MEMBERS, WHEN IT HEARD THAT THERE WAS A PAYMENT MADE, RAN TO THE ATTORNEY, WHOM I THINK WAS MR. STEEN, I THINK, WHO DESCRIBED THE PAYMENT AS BEING IMPROPER AND THEY REFUSED TO PARTICIPATE. I THINK MOST OF COUNSEL INVOLVED IN THIS CASE FELT THE SAME WAY, SO, THEREFORE, I DON'T THINK THE CCM MEMBERS WHO RECEIVED THE MONEY SHOULD BE ALLOWED TO KEEP IT. SO, WE'RE GOING TO REQUIRE THEM TO PAY THE MONEY BACK.

NOW, THERE WAS A SUGGESTION THAT MAYBE YOU OUGHT TO PUT IT IN THE REGISTRY OF THE COURT. I DON'T THINK THAT WOULD DO ANY GOOD. I DON'T THINK THAT CAN GO INTO THE ESTATE AS I READ THE STATUTE. I THINK COUNSEL IS RIGHT, THAT IF PAYMENTS WERE MADE, AND THEY NEED TO BE RETURNED, IF THE COURT ORDERS DISGORGEMENT, THEN WE NEED TO RETURN THE MONEY. AND THAT'S WHAT I'M [37] GOING TO DO.

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AND I WILL SET AN APPROPRIATE TIME FOR THAT TO BE CARRIED OUT.

SO, THE CCM MEMBERS HAVE UNTIL JUNE 30TH TO RETURN THE MONEY TO SWEPCO. WRITTEN VERIFICATION SHALL BE FILED IN THE RECORD ON OR BEFORE THAT DATE.

ANY MONEY RECEIVED BY SWEPCO CANNOT BE RETURNED INDIRECTLY TO THESE PEOPLE IN FORMS OF OTHER TYPES OF PAYMENTS.

IN OTHER WORDS, WHEN I IMPOSE A SANCTION, LIKE IN A DISCOVERY MATTER, I DON'T WANT THE LAWYER WHO GETS THE SANCTION TO GIVE THE CHECK BACK. THE CHECK HAS TO BE KEPT, THE CHECK HAS TO BE CASHED AND THE MONEY HAS TO BE PUT IN YOUR ACCOUNT. BUT I BETTER NOT FIND OUT THAT THE MONEY WAS RETURNED, IN CASH OR ANY OTHER WAY.

NUMBER TWO, I WANT A COPY OF THIS OPINION GIVEN TO, WHEN IT IS TRANSCRIBED AND I'M SURE PARTIES ARE GOING TO WANT TRANSCRIPTIONS HERE, BUT AFTER THE PARTIES GET — LET ME PUT IT THIS WAY: I DON'T CARE WHETHER THE CCM MEMBERS OR THEIR ATTORNEY GET A COPY OF THE OPINION OR NOT, THAT'S FOR THE PARTIES TO RESOLVE. I WANT THEM TO COME PERSONALLY TO THE COURT. AND THAT IS GOING — YOU KNOW, IF COUNSEL WANTS TO GIVE THEM A COPY, THAT'S YOUR BUSINESS, BUT I WANT AN ATTORNEY, THE GENERAL MANAGER OR PRESIDENT, WHATEVER,

WHO IS THE HIGHEST RANKING PERSON, AND I WANT A [38] REPRESENTATIVE OF THE BOARD, IT CAN BE THE BOARD PRESIDENT OR ANYBODY ELSE, FROM EACH OF THE SEVEN CCM'S TO APPEAR IN COURT ON — LET'S JUST MAKE THIS ON THE 25TH OF JUNE. I HAVE A LOT OF MATTERS SET THAT DAY, BUT ONE MORE IS NOT GOING TO HURT AND THIS WON'T TAKE LONG.

IS THERE A PROBLEM?

MS. COHEN: YOUR HONOR, WITH RESPECT TO THAT PORTION OF YOUR HONOR'S ORDER THAT REQUIRES THE DISGORGEMENT BY JUNE 30TH, IF I MAY PLEASE INFORM THE COURT THAT THESE CO-OPS DON'T HAVE LARGE BANK ACCOUNTS FOR THE MOST PART. ALL THE MONEY THAT THEY HAVE COMES FROM RATE PAYERS.

THEY MAY BE UNABLE TO —

THE COURT: WELL, THAT'S WHY WE WILL MEET ON THE 25TH, AND IF THEY NEED MORE TIME, THEY CAN ASK FOR IT ON THE 25TH.

MS. COHEN: THANK YOU.

THE COURT: BUT RIGHT IT IS ON — WE'LL DO IT ON JUNE 25TH.

WE WILL DO IT ON JUNE 25TH. I HAVE SEVEN OTHER MOTIONS THAT DAY, BUT THIS SHOULD NOT TAKE THAT LONG. AND WE WILL JUST DO IT THAT

DAY AT 9:00 O'CLOCK. AND THE PEOPLE HERE NEED TO BE HERE.

I ADVISED THEM OF THEIR RIGHTS. IF THERE A NEED [39] FOR ASKING FOR MORE TIME, WE'LL DO IT. BUT I'LL SAY THIS, ONCE THE TIME IS SET AND THEY DON'T COMPLY, THEY GET FINED BY DAY. AND AFTER THE FOURTH DAY OF DOUBLING THE FINES, THEY ARE IN JAIL UNTIL THEY PAY. THAT'S GOING TO BE THE RULE, AND NO PLAYING AROUND WITH THE MONEY.

AND I WILL CONSIDER PROBLEMS, BUT SOME OF THESE COMPANIES: APPARENTLY HAD SOME CASH THAT WAS AVAILABLE AND NOBODY TOLD THEM TO TAKE THE MONEY. AND I BET YOU THEY DID NOT ASK FOR RATE REDUCTIONS WHEN THEY TOOK THE MONEY.

THE ORAL REASONS GIVEN BY THE COURT TODAY CONSTITUTE THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER RULE 52.

THE COURT WILL RESERVE ITS RIGHT TO SUPPLEMENT ITS ORAL REASONS WITH WRITTEN REASONS AT A LATER DATE IF NECESSARY.

THE COURT IS GOING TO REQUEST COUNSEL FOR THE APPELLANTS TO PREPARE A PROPOSED JUDGMENT FOR THE COURT TO SIGN.

SINCE EVERYBODY IS HERE AND IT'S ONLY 3:00 O'CLOCK, IT SEEMS TO ME THAT WE OUGHT TO BE

ABLE TO GET IT PREPARED AT SOMEBODY'S OFFICE AND FILED BACK WITH THE COURT.

IT'S PRETTY SIMPLE, BUT I WANT IT APPROVED AS TO [40] FORM SO THERE WON'T BE ANY MISCONCEPTION. BUT, YOU KNOW, YOU CAN FILE IT TOMORROW, BUT I JUST THINK EVERYBODY IS HERE. BUT I WOULD LIKE TO HAVE IT FILED BEFORE THE END OF THE WEEK. AND I WILL GIVE YOU UNTIL THE 19TH TO PREPARE AND SUBMIT THE JUDGMENT PREPARED — APPROVED AS TO FORM BY ALL PARTIES.

AND IN SUMMARY, YOU KNOW, THE COURT'S ORDER IS: AFFIRMS THE BANKRUPTCY COURT INSOFAR AS THE APPLICABILITY OF 1129(A)(4), REVERSES THE BANKRUPTCY COURT ON OTHER MATTERS THAT ARE RAISED IN THE APPELLANTS' BRIEF, ORDERS DISQUALIFICATION OF THE SWEPCO PLAN, ORDERS DISGORGEMENT, DISGORGEMENT TO BE BY JUNE 30TH, PAYMENTS TO BE MADE — REFUNDED BY JUNE 30TH.

MEETING WITH THE ATTORNEY AND THE BOARD MEMBER AND PRESIDENT OF GM SHALL BE ON THE 25TH AT NINE. AND ALSO, THE EXCLUSIVITY PORTION OF THE AGREEMENT IS STRICKEN.

NOTHING NEED BE PUT IN THE JUDGMENT REGARDING MATTERS THAT I SAID REGARDING THE UNITED STATES ATTORNEY OR ANYTHING ELSE. THAT'S NOT FOR THE PARTIES. THAT IS A MATTER THAT I THINK THAT HAS TO BE DONE. AND I THINK

THE UNITED STATES SAID IT HAS ALREADY DONE IT. BUT I THINK AS A JUDGE I ALSO HAVE TO ASK THAT IT BE LOOKED INTO.

[41] IF THERE ARE NO VIOLATIONS, THE UNITED STATES ATTORNEY'S OFFICE CAN SAY SO. SOMETHING HAPPENED IN A PRESS RELEASE YESTERDAY THAT I DID READ, AND IF THERE IS SOMETHING, THEN THE UNITED STATES ATTORNEY CAN TAKE WHATEVER ACTION IS NECESSARY, AND I HAVE FULL FAITH IN THE ABILITY OF THE UNITED STATES ATTORNEY OFFICE TO CONDUCT THIS INVESTIGATION IN A FAIR AND IMPARTIAL MANNER.

* * *

APPENDIX D — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF LOUISIANA DATED SEPTEMBER 8, 1997 AND FILED SEPTEMBER 10, 1997

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 94-2763 B-2

CASE NO. 94-11474

Chapter 11

IN RE:

CAJUN ELECTRIC POWER COOPERATIVE, INC.,

Debtor

ORDER

Before the court is the motion of the Chapter 11 Trustee seeking an order denying confirmation of the plan of reorganization filed by the Unofficial Committee of Certain Members Committee, Southwestern Electric Power Company ("SWEPCO"), and Gulf States Utilities Company, and/or requiring certain member cooperatives to disgorge payments received from SWEPCO (Docket # 2785). After hearing the evidence and argument of counsel, the matter was taken under advisement. Now, for the oral reasons given in open court on September 3, 1997,

IT IS ORDERED that the said Motion be and the same is hereby **DENIED.**

Appendix D

THUS DONE AND SIGNED in Chambers at Opelousas, Louisiana, on September 8, 1997.

s/ Gerald H. Schiff
Gerald H. Schiff
United States Bankruptcy Judge

EOD 9/10/97
NOTICE MAILED TO:
On 9/10/97 By Regina Callihan

APPENDIX E — EXCERPTED RULINGS FROM TRANSCRIPT OF JUDGE GERALD H. SCHIFF FOR THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF LOUISIANA DATED SEPTEMBER 3, 1997

CIVIL ACTION
NO. 94-2763

IN RE:

CAJUN ELECTRIC POWER COOPERATIVE, INC.

Debtor

RALPH R. MABEY, CHAPTER 11 TRUSTEE FOR CAJUN ELECTRIC POWER COOPERATIVE, INC.

Conference call in the above captioned hearing, taken at the offices of Stone, Pigman, Walther, Wittmann & Hutchinson, 546 Carondelet Street, New Orleans, Louisiana 70130, on Wednesday, the 3rd day of September, 1997

REPORTED BY:

PHALA F. POWELL
CERTIFIED COURT REPORTER

[21] * * *

Just one moment, please. I'm going to switch gears a bit and now get to the other matters that have been under advisement regarding the Trustee's modification to the plan, change of votes, the late filed claim by Teche, and the change of preferences, and the SWEPCO payment.

Appendix E

By December 6, 1996, the equity security holders, with the exception of Teche, cast their ballots for one of the three pending plans of reorganization. In addition, the same parties were also permitted to indicate their preference for such plans in the event more than one plan was determined by the Court to be confirmable. The Members voted, and when I refer to the Members, I mean the Members Committee, the original Members Committee voted overwhelmingly in support of both the SWEPCO/GSU/Members plan and the Enron plan, and just as uniformly against the [22] Trustee/Louisiana Generating plan. In addition, the Members overwhelmingly selected the SWEPCO plan as their first, and the Enron plan as their second preference. Not surprisingly, the Trustee's plan received no preferential support from the Members. Again, and certainly not to the Court's surprise, negotiations among the plan proponents and the various constituents, primarily the Members, continued, and continued at an apparent feverish pace. Between December 16, 1996 and January 7, 1997, three member cooperatives, SLEMCO, Pointe Coupee, and Concordia announced in open court that each had reached an agreement with respect to the rate paths being proposed by Louisiana Generating, and accordingly, each was going to formally seek to withdraw their support of the SWEPCO plan and to change their vote and preference to the Trustee plan.

A truly dramatic and watershed event occurred in this case on January 7 of 1997, where, on the motion of SLEMCO, the Court disqualified the Members Committee [23] counsel due to an obvious contractual conflict. But for this event, one of the three plans would have been confirmed some time ago. But history being what it is, confirmation of any plan is still some time away. The disqualification of the Dan Pecar firm created a three-month hiatus in the confirmation process. This hiatus

spawned significant other matters, which, in themselves, have put off confirmation for several months.

Matters which I will discuss now deal with the following pending matters: The motion to disqualify the SWEPCO plan as a result of the payment of $ 1 million made by SWEPCO to the Members; the Members Committee motion to strike the modifications of the Trustee's plan; change of vote motions of SLEMCO, Pointe Coupee, and Concordia; Teche's motion for authority to cast the late vote. These motions under Rule 3019 for determination of further disclosure by the Trustee is not necessary.

I will first discuss the SWEPCO payment. Following court on January 7, a [24] meeting was held that evening at the Hilton Hotel in Lafayette, and as a result of events which occurred at that meeting SWEPCO transferred the sum of $ 1 million to counsel for the Members Committee. Money was disbursed in two installments of $500,000 each, the first being sent to Mr. Klieman on January 24, and the second to Mr. Sharp on April 7. Messrs. Kleiman and Sharp, in turn, disbursed the money, not to the original Members Committee consisting of ten co-ops, but to the reconstituted Committee of Certain Members, which consisted of seven co-ops, which were the original ten less SLEMCO, Pointe Coupee, and Concordia.

On April 16, SWEPCO and the reconstituted committee filed a joint report in which they disclosed the circumstances of the $1 million payment, which they had referred to as a transition assistance payment. Shortly following the filing of that joint report, the Trustee filed a response, and combined with the response was a motion seeking instant [25] denial of confirmation of the SWEPCO plan, with an alternative request

that the cooperatives disgorge the payments made. Louisiana Generating, RUS, Western Fuels, Triton, and American Commercial Marine Service all intervened and joined with the Trustee in such a motion. SLEMCO and Pointe Coupee attempted to join, but their efforts were denied by the Court as having been filed untimely.

Hearing on the motion was commenced on July 7, and after approximately six days of testimony, completed on July 22nd.

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Each claim has in some way made provision that upon confirmation of the plan the legal and related expenses of certain cooperative Members would be paid within certain limits. The Trustee and Louisiana Generating plan makes such provision in the modification which was filed in March, although the payment is being made by RUS. Enron included a cost and expense paragraph in the MOU that had been negotiated or that was negotiated with [26] several cooperative members, and apparently agreement was reached in April of 1997.

SWEPCO, though, made an initial disclosure of reimbursement of expenses in its supplemental disclosure statement, which was approved by the Court in November of 1996. I'm not going to read the SWEPCO disclosure other than the second sentence which provides that, quote, In addition, SWEPCO may agree to pay certain expenses of the Members Committee in regard to certain litigation and the plan confirmation process, close quote.

As early as November 16, 1996, SWEPCO and the committee were conducting negotiations with respect to reimbursement of fees and expenses, which negotiations the Court found within the certain expenses referred to in the second

sentence of the disclosure statement. I believe this was of the subject of Mr. Klieman's memorandum to the Members on that date, which transmitted SWEPCO's offer with respect to fees.

At the Hilton meeting on [27] January 7, Mr. Smith, SWEPCO's president, for the first time suggested an immediate $1 million payment. He testified that the payment was made to assist the members in their ongoing struggle for confirmation of the SWEPCO and Members plan. The evidence is overwhelming that the $1 million payment, by whatever name you choose to call it, was generally made without strings attached. There is no credible evidence which suggests otherwise. The only requirement was that the funds would be repaid to SWEPCO in the event that the following happened, another plan was confirmed and the Members received reimbursement under the confirmed plan. The members also agreed to use their best effort to negotiate expense reimbursement, as a successful plan proponent.

The question was asked of several witnesses, including Mr. Smith, what did SWEPCO get for their $1 million. The answer was generally uniform, nothing. The Court believes, though, that while there was nothing specific that SWEPCO [28] either asked for or was promised, surely they anticipated that the money would not be used in order to benefit either of the plans of Enron or Louisiana Generating, but would, in some way, further SWEPCO's chances of success. I do not find this to be inappropriate. The fact is that SWEPCO was and is a major player in this Chapter 11 case. Mr. Smith was in court when the Dan Pecar firm was disqualified, and he saw the impact of the decision on the joint confirmation effort of SWEPCO and the Committee. There was no testimony whatsoever that the payment had been discussed or even contemplated prior to

January 7. The Court finds the payment to be as characterized by SWEPCO, and that is a transition assistance payment.

To be sure, allegations of vote buying have surfaced with to this payment. At the time the payment was conceived and when it was made, however, the votes were already in. The ballots were filed in early December of 1996. Each member had already voted for the SWEPCO [29] plan. As stated earlier in the terms of the letter of Mr. Gilliam of January 9, clearly indicate that the payment did not lock in any of the members. They were free to meet and negotiate. In fact, they did.

A complaint was further made that SWEPCO did not disclose the payment to the Court until the Trustee learned of the payment in early April and forced SWEPCO to make the disclosure. The Court finds that while the negotiations between SWEPCO and the committee were deemed confidential at the time, there was at all times an intent to make disclosure of the payment at an appropriate time. This is clearly borne out by reference to the draft of the term sheet originally dated in February of 1997. The Court further concludes that the second sentence in the SWEPCO disclosure statement placed all parties on notice of the possibility of the payment of additional funds may be negotiated. And I do not believe that this second sentence of the disclosure statement should be narrowly construed.

[30] In late April 1997, SWEPCO and the committee, the reconstituted committee, caused to be filed with the court a term sheet executed by the parties. There was, in Paragraph 5, language under the phrase "additional terms," additional language with respect to fee and expense reimbursement. And I believe that the inclusion of this language in that agreement

was merely the culmination of the months of negotiation between SWEPCO and the committee.

The Trustee and others point to a lock-in which was contained in Paragraph 6 of the term sheet, entitled "Agreement and Obligations of the Parties," requiring Members to exclusively support the joint plan. I will address the requirement or the suggestion of the lock-in through these readings. I do not find, however, that the provisions of Paragraph 6 of the term sheet suggest that any violations or any lock-in has occurred.

I turn to whether or not the Court should grant any relief, requested by [31] the Trustee. In doing so, I look at Section 1129(a)(4) to see whether or not that applies to the transition payment which was made by SWEPCO to the Members Committee, and if so, does the lack of Court approval of such payments require the death penalty which the Trustee seeks, which is denial of confirmation of the SWEPCO plan.

Deleting some of the language from 1129(a)(4), it requires any payment made or to be made by the proponent or by a person acquiring property under the plan for services or for costs and expenses in or in connection with the plan, or in connection with the plan as an incident to the case has approved by or is subject to the approval of, the court has reasoned, I feel the dictates of Section 1129(a)(4) are clear. SWEPCO is a plan proponent and will acquire property under its plan. The transition assistance payment is for services and costs in connection with or incident to the case and is a prerequisite to confirmation. Such payments must be [32] approved by the Court as reasonable.

Appendix E

The Trustee would ask the Court to conclude that Section 1129(a)(4) requires prior approval of the payment. I do not read Section 1129(a)(4) that way. I believe that the conclusion is that the plan cannot be confirmed until such time as the Court makes a determination of the reasonableness of such payments. I think the relief sought by the Trustee is inappropriate. While there has been some suggestions that the conduct was so egregious that the effect cannot be undone, unring the bell, or unscramble the eggs, I do not agree with such suggestions of doomsday.

The Court will order SWEPCO and the Members Committee within 30 days to file an appropriate application with the Court seeking nunc pro tunc approval of the payment of the transition assistance payment to the Members Committee, and, thereafter, to the individual members.

In addition, no further payments shall be made by SWEPCO to the [33] Members Committee or to the individual members unless and until the Court has approved the reasonableness of such payments, all after notice in the hearing.

* * *

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC DATED AND FILED OCTOBER 29, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30683

In The Matter Of: CAJUN ELECTRIC POWER COOPERATIVE, INCORPORATED,

Debtor

RALPH R. MABEY, Chapter 11 Trustee for Cajun Electric Power Cooperative, Inc.; LOUISIANA GENERATING LLC; TRITON COAL COMPANY; WESTERN FUELS ASSOCIATION, INC.; ENRON CAPITAL AND TRADING RESOURCES INC.; AMERICAN COMMERCIAL MARINE SERVICE COMPANY; UNITED STATES OF AMERICA, RURAL UTILITIES SERVICE,

Appellees,

v.

COMMITTEE OF CERTAIN MEMBERS OF CAJUN ELECTRIC POWER COOPERATIVE; SOUTHWESTERN ELECTRIC POWER COMPANY,

Appellants.

Appeal from the United States District Court
for the Middle District of Louisiana, Baton Rouge

Appendix F

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion 8/11/98, 5 Cir., _____, _____ F.3d _____)

Before KING, SMITH and PARKER, Circuit Judges.

PER CURIAM:

Treating the Petitions for Rehearing and Suggestions for Rehearing En Banc (which have been circulated to the full court) as motions to recall the mandate in order to restore jurisdiction to the Court of Appeals to enable the court to consider such Petitions and Suggestions, such motions to recall the mandate are DENIED.

ENTERED FOR THE COURT:

s/ Carolyn Olivier King
United States Circuit Judge

Judge Duhé did not participate in the consideration of the Suggestion for Rehearing En Banc.

APPENDIX G — RELEVANT STATUTES

11 U.S.C. § 363

§ 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then —

> (A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and
>
> (B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the

Department of Justice, of the notification required, under such subsection (a), unless such waiting period is extended —

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless —

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if —

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if —

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(*l*) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(*o*) In any hearing under this section —

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2572; Pub.L. 98-353, Title III, § 442, July 10, 1984, 98 Stat. 371; Pub.L. 99-554, Title II, § 257(k), Oct. 27, 1986, 100 Stat. 3115; Pub.L. 103-394, §§ 109, 214(b), 219(c), 501(d)(8), October 22, 1994, 108 Stat. 4106.

* * *

11 U.S.C. § 1123

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall —

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2), or 507(a)(8) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as —

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends; and

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee.

(b) Subject to subsection (a) of this section, a plan may —

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for —

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

(d) Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2631; Pub.L. 98-353, Title III, § 507, July 10, 1984, 98 Stat. 385; Pub.L. 103-394, §§ 206, 304(h), 305(a), 501(d), October 22, 1994, 108 Stat. 4106.

* * *

Appendix G

11 U.S.C. § 1129

§ 1129. Confirmation of plan

(a) The court shall confirm a play only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the

interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests —

(A) each holder of a claim or interest of such class —

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each

holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests —

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that —

(A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive —

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides —

(i)(I) that the holders of such claims retain the liens securing such claims,

whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims —

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a

value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

(C) With respect to a class of interests —

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If

the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2635; Pub.L. 98-353, Title III, § 512, July 10, 1984, 98 Stat. 386; Pub.L. 99-554, Title II, §§ 225, 283(v), Oct. 27, 1986, 100 Stat. 3102, 3118; Pub.L. 100-334, § 2(b), June 16, 1988, 102 Stat. 613; Pub.L. 103-394, §§ 304(h), 501(d), October 22, 1994, 108 Stat. 4106.

* * *

No. 98-1206

In The

Supreme Court of the United States

October Term, 1998

RALPH R. MABEY, CHAPTER 11 TRUSTEE FOR CAJUN ELECTRIC POWER COOPERATIVE, INC., AMERICAN COMMERCIAL TERMINALS LLC, WESTERN FUELS ASSOCIATION, INC., AND TRITON COAL COMPANY LLC,

Petitioners,

vs.

SOUTHWESTERN ELECTRIC POWER COMPANY AND THE COMMITTEE OF CERTAIN MEMBERS OF CAJUN ELECTRIC POWER COOPERATIVE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *United States v. Knight*, 336 U.S. 505 (1949), upholding a criminal conviction of a defendant who aided and abetted a bankruptcy trustee in unlawfully appropriating estate property, conflicts in any way with the Fifth Circuit's decision in this case to permit payments among plan co-proponents for professional and plan expenses subject to final approval of the bankruptcy court.

2. Whether a consensual plan of reorganization in which plan co-proponents shared legal expenses during the course of the bankruptcy can violate the absolute priority rule for "cram-down" plans.

LIST OF PARENT COMPANIES AND NON-WHOLLY-OWNED SUBSIDIARIES PURSUANT TO SUPREME COURT RULE 29.6

The Committee of Certain Members of Cajun Electric Power Cooperative (the "CCM") is an unofficial committee that is represented in this case by its own bankruptcy counsel and comprises the following six distribution cooperatives: Beauregard Electric Cooperative, Inc.; Dixie Electric Membership Corporation; Jefferson Davis Electric Cooperative, Inc.; Northeast Louisiana Power Cooperative, Inc.; South Louisiana Electric Cooperative Association; Valley Electric Membership Corporation. A seventh distribution cooperative, Washington-St. Tammany Electric Cooperative, Inc., while no longer a member of the CCM, was such a member at all times during the litigation of this matter through the date of the Fifth Circuit's August 11, 1998, opinion.

The foregoing seven distribution cooperatives are not publicly-held companies but are owned by their individual rate-paying, retail customer-members. None of the foregoing distribution cooperatives have a parent company or a subsidiary which issues public shares.

Southwestern Electric Power Company ("SWEPCO") is a wholly-owned subsidiary of Central and South West Corporation ("CSW"). SWEPCO has partially-owned subsidiaries: Arklahoma Corp. and Southwest Arkansas Utilities Corporation. CSW, which has a number of other wholly-owned subsidiaries, is the only affiliate that has issued shares to the public.

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STATEMENT OF THE CASE

A. Nature of the Case.

In the underlying bankruptcy case, Southwestern Electric Power Company ("SWEPCO") and several electric cooperatives jointly proposed a plan of reorganization under which they would enter into new, mutually acceptable and mutually desirable, long-term business relationships. This dispute presented, under unusual facts and based upon a factually intensive ruling, the issue of the extent to which bankruptcy law regulates understandings reached between such co-proponents to allocate among themselves the legal and related litigation costs incurred in seeking confirmation of their joint plan. Relying on changing theories of the case, Petitioners contend that bankruptcy law prohibits any allocation of costs by which payments are made to plan co-proponents who are also creditors or equity interest holders. As resolved by the unanimous decision of the Fifth Circuit Court of Appeals, the applicable rule provides that such payments are not prohibited but are subject to approval by the bankruptcy court as reasonable.

B. Factual Background.

SWEPCO and an unofficial committee ("CCM") composed of non-profit rural electric distribution cooperatives, each of which is a member of Cajun Electric Power Cooperative, Inc. ("Cajun" or "Debtor"), are co-proponents of a plan of reorganization (the "Joint Plan" or the

"SWEPCO Plan") filed in Cajun's chapter 11 case. App. at 2a, 3a.[1]

The CCM members presently purchase and distribute to retail customers in rural Louisiana electricity produced from Cajun's electric generating assets. Faced with the bankruptcy of their electricity supplier, several distribution cooperatives approached SWEPCO in the spring of 1995 and invited it to join in an effort to acquire Cajun's assets. Joint App. at 3243. The Joint Plan, originally filed on April 19, 1996, provides that a SWEPCO affiliate (i) will purchase Cajun's non-nuclear electric generating and transmitting assets and (ii) will enter voluntarily negotiated, mutually acceptable, new power supply contracts with consenting distribution cooperatives to supply their electricity requirements for twenty-five years. App. at 3a; Joint App. at 499, 766-926.

The plan presented by the Trustee (the "Trustee's Plan"), and supported by the other Petitioners, proposes to sell the assets to Louisiana Generating LLC ("Generating"). A third plan (the "Enron Plan") proposed a sale to an affiliate of Enron Capital & Trade Resources Corp. App. at 3a. These two Plans provided for the successful purchaser to obtain new, long-term contracts granting to it the right to sell to the distribution cooperatives all of their electricity requirements but, unlike the Joint Plan, would obligate the distribution cooperatives without their consent to the new contracts. App. at 3a; Joint App. at 998-99, 1325-85. None of the three Plans proposed

[1] "App." refers to the Appendix attached to the Petition for Writ of Certiorari. "Joint App." refers to the Joint Appendix filed with the court of appeals below.

assigning to the purchaser the existing power supply contracts between Cajun and the distribution cooperatives, the terms of which preclude Cajun from charging rates at levels from which it could earn any profits on its operations. Joint App. at 973-76.

In early 1997, SWEPCO calculated that, under the rates then proposed, the distribution cooperatives' purchase obligations for the first year alone would be approximately $220 million under the Joint Plan and approximately $250 million under the Trustee's Plan and the Enron Plan. Joint App. at 4327. By contrast, the CCM members' collective unsecured claims are approximately $616,000. Pet. at 5.

By the December 6, 1996, deadline for creditors to vote on the Plans, the distribution cooperatives voted overwhelmingly for the Joint Plan and for the Enron Plan and overwhelmingly against the Trustee's Plan. App. at 7a. The distribution cooperatives did not control the classes of unsecured creditors containing their claims under the three Plans and were not permitted to vote as equity interest holders on the Plans because they would not receive any property on account of those interests. App. at 25a, 26a. Before the Fifth Circuit, Petitioners, SWEPCO and the CCM all agreed that the "CCM members' votes were, as a practical matter, 'not worth buying'. . . . " App. at 25a.

The bankruptcy court commenced confirmation hearings on December 16, 1996. During that week, two distribution cooperatives, who were members of the unofficial members committee, announced in open court that they desired to withdraw their support for the Joint Plan and

to change their votes to ones in favor of the Trustee's Plan. On January 2, 1997, one of those distribution cooperatives moved to disqualify the CCM's counsel. App. at 7a. Thereafter, the following occurred, as set forth in the bankruptcy court's findings of fact made after conducting a six-day trial:

"A truly dramatic and watershed event occurred in this case on January 7 of 1997, [when] . . . the Court disqualified the Members Committee counsel due to an obvious contractual conflict." App. at 83a. A meeting was held that evening "and as a result of events which occurred at that meeting SWEPCO transferred the sum of $1 million to counsel for the Members Committee." App. at 84a. At that meeting, SWEPCO's president, who "was in court when the [Dann] Pecar firm was disqualified," App. at 86a,

> for the first time suggested an immediate $1 million payment. He testified that the payment was made to assist the members in their ongoing struggle for confirmation of the SWEPCO and Members plan.

App. at 86a. The bankruptcy court went on to find as follows:

> . . . The **evidence is overwhelming** that the $1 million payment, by whatever name you choose to call it, was generally made without strings attached. There is **no credible evidence** which suggests otherwise. The only requirement was that the funds would be repaid to SWEPCO in the event that the following happened, another plan was confirmed and the Members received reimbursement under the confirmed plan. The members also agreed to use their best effort to

> negotiate expense reimbursement, as a successful plan proponent.
>
> . . . [T]he payment . . . is a transition assistance payment.

App. at 86a, 87a (emphasis added).

C. Prior Proceedings.

On April 17, 1997, prior to the resumption of the confirmation hearings which the bankruptcy court had continued because of the disqualification of counsel, SWEPCO and the CCM filed with the bankruptcy court a Joint Report discussing in detail the payment at issue. App. at 11a. On April 18, 1997, the Trustee filed, in a single document, a response to the Joint Report and a combined motion and memorandum seeking immediate denial of confirmation of the Joint Plan and/or disgorgement of the payments. App. at 13a. Unlike the Petition before the Court, the motion relied principally on § 1129(a)(4) of the Bankruptcy Code, which requires for a plan to be confirmed that:

> Any payment made or to be made by the proponent [of a plan], by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to approval of, the court as reasonable.

Joint App. at 1671-79.

The bankruptcy court denied the Trustee's motion after a trial in which the court heard six days of testimony from 16 witnesses and received over 80 exhibits into evidence. App. at 14a. In its oral ruling, the bankruptcy court made specific findings of fact and determined that the payment "is for services and costs in connection with or incident to the case;" held "[s]uch payments must be approved by the Court as reasonable;" rejected the Trustee's argument that § 1129(a)(4) required court approval prior to the payment; and held that court approval could be obtained subsequently. App. at 88a, 89a.

The bankruptcy court rejected Petitioners' accusations of vote buying, improper lock-up and bad faith, finding:

> At the time the payment was conceived and when it was made, however, the votes were already in . . . As stated earlier in the terms of the letter of . . . [SWEPCO's attorney] of January 9, clearly indicate that the payment did not lock in any of the members. They were free to meet and negotiate [with all potential purchasers]. In fact, they did.

App. at 87a. The bankruptcy court also rejected Petitioners' assertions of inadequate disclosure and found as facts that (i) the disclosure statement for the Joint Plan approved on November 22, 1996, placed all parties on notice that such a payment may be negotiated; and (ii) SWEPCO and the CCM at all times intended to make disclosure at the appropriate time. App. at 87a.

The district court, sitting as an appellate court, held the bankruptcy court's factual findings were clearly erroneous and reversed the bankruptcy court on all issues then raised by Petitioners. App. at 49a, 56a. The district court ordered the immediate disqualification of the Joint Plan and an immediate refund of the $1 million payment. The district court ordered the money repaid to SWEPCO, because it concluded that the money could not go into the bankruptcy estate. App. at 74a, 75a.

The district court ruled, among other things, that SWEPCO and the CCM violated § 1129(a)(4) because

> SWEPCO failed to get prior approval and the Court believes that the payments were made for an improper purpose, namely, the Court believes that this was made as a preconfirmation payment to lock in votes.

App. at 50a.

SWEPCO and the CCM appealed to the Fifth Circuit Court of Appeals, which stayed the district court's order. App. at 19a. In a unanimous decision entered August 11, 1998, the court of appeals reversed the district court, affirmed the bankruptcy court and directed that "[t]he mandate shall issue forthwith." App. at 36a.

The court of appeals' opinion addressed each ground relied upon by the district court. The court of appeals held the district court erred in holding that the bankruptcy court's factual findings were clearly erroneous and reversed the district court's holdings that (i) the payment was made for an improper purpose, *i.e.*, to buy the CCM members' votes; (ii) the Joint Plan violated § 1125 of the Bankruptcy Code because the disclosure

was inadequate; and (iii) the Joint Plan violated § 1129(a)(3) of the Bankruptcy Code. App. at 26a, 32a, 35a.

The court of appeals reversed the district court's rulings on the absolute priority rule and on § 1123(a)(4) of the Bankruptcy Code, each for the following same reasons: (i) "the payments were not derived directly or on this record indirectly, from assets of the bankruptcy estate;" and (ii) "as the bankruptcy court found, the payments were not made in satisfaction of the CCM members' claims against Cajun, but rather as reimbursement for plan and litigation expenses incurred in the bankruptcy case." App. at 33a, 34a.

The court of appeals affirmed the bankruptcy court's rulings on § 1129(a)(4) and rejected the district court's construction of that section to require court review prior to payment. App. at 20a-30a. Thus, the court of appeals affirmed both the factual finding that the payments were reimbursement for legal and plan expenses and the holding that the payments were subject to court approval as reasonable.

Petitioners' brief to the Fifth Circuit did not present any arguments analyzing the absolute priority rule. Nor did it cite *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988) (*"Ahlers"*). Petitioners' brief did cite *United States v. Knight*, 336 U.S. 505 (1949) (*"Knight"*), a case not previously cited by Petitioners to either the bankruptcy court or the district court.

After the court of appeals' decision, Petitioners filed a "Suggestion for Rehearing *En Banc* by Appellees", which also contained a request for panel rehearing.

There, Petitioners discussed *Knight* more extensively than initially; cited *Ahlers*; and, for the first time before any court, attempted to develop an argument regarding the absolute priority rule.

The court of appeals took the filing as a motion to recall the mandate to restore jurisdiction in the court of appeals and denied it *per curiam*. App. at 91a.

On January 27, 1999, 169 days after entry of judgment by the court of appeals, Petitioners filed their Petition for Writ of Certiorari.

On February 11, 1999, the bankruptcy court entered its Reasons for Decision on the confirmation of the Trustee's Plan and the Joint Plan, which denied confirmation of both and provided some guidance for possible plan modifications. In its Reasons for Decision, the bankruptcy court concluded, among other things, that (i) the Trustee's Plan did not satisfy § 1129(a)(3), which requires a finding that the plan was proposed in good faith and not by means forbidden by law; (ii) the Joint Plan complied with § 1129(a)(3); and (iii) the Joint Plan satisfied the requirements of § 1129(a)(8), a finding which as a matter of law obviates the need to address compliance with the absolute priority rule.

REASONS FOR DENYING THE WRIT

A. The Petition Is Untimely.

The court of appeals order, entered on August 11, 1998, reversed the district court order and directed that the mandate issue forthwith. This terminated the court of

appeals' jurisdiction over the case. *Boston & Maine Corp. v. Town of Hampton*, 7 F.3d 281, 282 (1st Cir. 1993); *United States v. Rivera*, 844 F.2d 916, 921 (2d Cir. 1989). This also necessarily reduced to zero the time period for filing a petition for rehearing. *Johnson v. Bechtel Assocs. Professional Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986). The court of appeals, treating the Petition for Rehearing and Suggestions for Rehearing *En Banc* as motions to recall the mandate, denied them on October 29, 1998. Accordingly, Petitioners did not file a timely petition for rehearing.

The time to file a petition for writ of certiorari, therefore, was not extended by Sup. Ct. R. 13.3. Petitioners did not file their Petition for Writ of Certiorari within 90 days after entry of judgment by the court of appeals. The Petition for Writ of Certiorari is thus untimely, and this Court lacks jurisdiction. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990); 28 U.S.C. § 2101(c).

B. The Questions Now Presented to This Court for Review Were Not Timely and Properly Presented to Nor Passed Upon by the Lower Courts.

This Court's traditional rule precludes a grant of certiorari when the question presented was not pressed or passed upon below. *Campbell v. Louisiana*, 523 U.S. 392 (1998); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994). That is the situation here.

Petitioners seek to have this Court address a legal question pertaining to *Ahlers* and the absolute priority rule even though they did not brief the question to the court of appeals until they sought rehearing, when Petitioners presented a different legal argument than now

raised. Then, Petitioners criticized the court of appeals' "test" because "it is essentially factual," and argued that application of the absolute priority rule cannot be based upon the parties' "justification for the payment." Suggestion at 15, 16. Now, before this Court, Petitioners argue that the justification for the payment, an inherently factual issue, is the test that must be used to determine whether the payment violates the absolute priority rule. Pet. at 14, 15.

Similarly, Petitioners ask this Court to address *Knight*, even though Petitioners failed to cite *Knight* or to present any arguments based on it to either the bankruptcy court or the district court.

Petitioners' attempt to use a writ of certiorari to enable them to argue before this Court issues which they failed to press properly and fully below is unjustifiable. The writ is properly denied.

C. The Actual Decision of the Court of Appeals Precludes the Adverse Consequences That Petitioners Argue Will Result.

Petitioners argue that this case is of general importance because the court of appeals' decision undermines rules of law protecting creditors and permits abusive practices in that it would allow, among other things, the following: (a) bidders for assets of a bankruptcy estate to pay cash directly to important stakeholders rather than to the estate; (b) stakeholders to extract money from bidders that would be otherwise distributed under the bankruptcy priority rules; and (c) payments to junior interests outside of a plan. Pet. at 2, 9, 13. Petitioners' arguments

are conclusively refuted, however, by (i) the factual finding affirmed by the court of appeals that the payment at issue was to cover legal and plan expenses incurred in connection with the bankruptcy case; and (ii) the holding affirmed by the court of appeals that the payment is subject to review and approval by the bankruptcy court as reasonable.

Although the applicability of § 1129(a)(4) and its requirement for court approval was the issue most extensively discussed by the court of appeals, the Petition avoids mentioning that. Petitioners' justification for the writ of certiorari necessarily relies on a materially incomplete and misleading description of the court of appeals' decision and does not present a valid reason for the writ to be granted.

D. The Trier of Fact, the Bankruptcy Court, Found All of the Material Facts in Favor of SWEPCO and the CCM. This Court's Decision in *Knight* Is Not Cause for Certiorari to Be Granted, but Rather Requires That These Fact Findings, and the Fifth Circuit's Decision, Remain Undisturbed.

Petitioners rely on *Knight* to argue that this Court should hear this matter. A review of the bankruptcy court's findings of fact and of the *Knight* decision itself compel the conclusion that the factual findings and holdings of the bankruptcy court, affirmed by the Fifth Circuit, must be left undisturbed.

The facts of this case establish the financial assistance as a legitimate business transaction: one plan co-proponent and co-litigant helping another with professional

fees in a critical time of need. No estate assets were used to pay these fees; the funds were SWEPCO's. The payments were not derived directly or even indirectly from estate assets and did not deplete the estate. No estate professionals were involved; the CCM is an unofficial private committee that was not appointed by the bankruptcy court. No illicit purpose was involved. The bankruptcy court found as a fact that there was no improper *quid pro quo* for the payment. It further found as a fact that the funds were for assistance in the transition to new counsel. The bankruptcy court found the disclosure adequate. The Fifth Circuit determined that these findings were not clearly erroneous.

Petitioners' reliance on *Knight* is without merit. *Knight* was a criminal case. The critical facts in *Knight* are that the buyer had agreed to pay a higher price, and the trustee then intentionally and falsely underreported the value of the estate's assets, enabling him to divert some of the purchase price for his own personal gain. *Knight* turned on egregious facts far removed from those found in this case.

In *Knight*, a buyer agreed to buy assets, including a fixed amount of net current assets, from a bankrupt company. The plan of reorganization that incorporated that sale was confirmed. Subsequently, the trustee for the bankrupt company approached the attorney for the buyer and informed him that, in addition to whatever fee the bankruptcy court would allow to him, he desired another $3,000. A scheme was hatched whereby the trustee would fraudulently underreport the net current assets by $3,000, effectively reducing the buyer's purchase price. The buyer then issued a check payable to its own lawyer, who

cashed the check, and, after deducting $500 for his own taxes, paid the remaining $2,500 to the trustee. All of this was done after confirmation, secretly and without court approval, and depleted assets of the estate.

The actual holding of *Knight* confirms that a fact finder's determinations concerning a transaction must be upheld where the evidence supports those findings. In *Knight*, the jury found that the buyer had agreed to pay a higher price that included the $3,000 that had been diverted to the trustee. The Third Circuit Court of Appeals reversed. In reversing the Third Circuit, this Court held as follows:

> There was substantial evidence that Maxi [buyer] agreed to pay $26,404.33 for the net current assets of Central [bankrupt] and that Knight was party to a scheme to divert $3,000 of the consideration to the personal ends of Michael [Trustee] and Reifsnyder. It was therefore an **improper interference with the jury's function** for the Court of Appeals to reject that theory of the case and to accept one which to it seemed more credible.

336 U.S. at 508 (emphasis added).

In this case, after a six-day trial, after hearing 16 witnesses and after considering over 80 exhibits, the bankruptcy court found that the payments were made for professional fees and expenses to help the Committee with its transition to new counsel. All votes on the plan had been cast well before any payments were made. The Joint Plan, which fixed the purchase price (initially, $780 million; now, $940.5 million), had been on file months before the financial assistance was provided. SWEPCO

never reduced its purchase price. In fact, over the next year, all bidders, including SWEPCO, raised their purchase prices significantly.

The holding in *Knight* simply recognizes that due deference must be given to the fact finder's determinations of the facts, which in *Knight* were particularly offensive, and the rule that findings of fact shall not be set aside unless clearly erroneous. Fed. R. Civ. P. 52(a); Fed. R. Bankr. P. 8013; *Amadeo v. Zant*, 486 U.S. 214, 223 (1988); *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

The bankruptcy court's ruling on these facts and the Fifth Circuit's upholding of the same are not cause to grant a writ. The Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981). Application of this rule is particularly appropriate where, as here, the trial court's factual findings were affirmed by the court of appeals. *Goodman v. Lumens Steel Co.*, 482 U.S. 656, 665 (1987); *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984).

Petitioners argue that the Fifth Circuit's decision will cause bankruptcy courts to lose control of bankruptcy sales and auctions. To the contrary, the Fifth Circuit held that § 1129(a)(4) requires bankruptcy court review and approval of fees paid by a plan proponent in connection with a plan.

Moreover, the Fifth Circuit's decision affirms that Petitioners had no evidence to substantiate their argument that purchase price consideration was used to influence stakeholders. The bankruptcy court found that the

payments were indeed to assist the CCM in transition to new counsel, and nothing more. The CCM has filed papers that describe and itemize expenses its members have incurred in this bankruptcy case that more than offset the amounts received from SWEPCO. Pursuant to the Fifth Circuit's ruling, the bankruptcy court must determine their reasonableness.

E. This Case Must Be Decided on Its Unique Facts and Those Facts, As Found and Affirmed Below, Refute the Underlying Factual Conclusions Upon Which Petitioners Premise Their Petition.

Denial of a writ of certiorari is fully appropriate when the case involves atypical or unique circumstances. *Curry v. Baker*, 479 U.S. 1301 (1986); *Singleton v. Commissioner of Internal Revenue Services*, 439 U.S. 940, 945 (1978) (acknowledging that "it [is] entirely appropriate to disfavor complicated cases which turn largely on unique facts").

For several reasons, the specific factual circumstances presented in this unique case must control the resolution. Among those factual circumstances are the following:

1. The payments resulted from the unusual and unanticipated disqualification of counsel for the CCM.

2. The payments were made by one proponent of a plan of reorganization to its co-proponent to cover the recipient's plan and litigation-related expenses, when there were two other competing plans pending.

3. The distribution cooperatives' principal status was as prospective parties to new supply contracts.

4. Cajun is a non-profit cooperative.

5. The bankruptcy involves a debtor in a regulated industry.

Non-profit cooperatives are unique entities. It is not surprising that, after wrestling with the application of the absolute priority rule in another electric cooperative chapter 11 case, the Seventh Circuit Court of Appeals concluded as follows: "it is small wonder that the rules of chapter 11 bankruptcy, primarily designed as they are for profit-seeking enterprises, are less than straightforward to apply here." *In re Wabash Valley Power Ass'n, Inc.*, 72 F.3d 1305, 1315 (7th Cir. 1995).

This bankruptcy case features economic tensions not normally associated with bankruptcy matters. This bankruptcy involves the economic conflict inherent in the task of determining a purchase price for business assets in a regulated industry covering non-profit cooperatives. The limitations on the future revenues that a purchaser can realize from its future customers from the output from those regulated assets create economic tension unlike that in most chapter 11 cases.

Furthermore, the specific facts of this case, and the findings of fact made and affirmed below, refute the underlying factual conclusions subsumed in the questions presented by Petitioners for review. Among the underlying factual conclusions not substantiated by factual findings made below are the following: (i) the newly

asserted contention[2] that SWEPCO only offered and the CCM members only accepted the payments because of the CCM members' claims and equity interests (which is contradicted by the bankruptcy court's findings of fact as to what was, and was not, the reason for the payments); (ii) the contention that the payments were made under a plan (which is contrary to the Petition's own characterization of the payments as made " 'outside' of and prior to a confirmed plan of reorganization," Pet. at *i*); and (iii) the contention that the payments were derived directly or indirectly from the assets of the estate (which the court of appeals determined was unsupported by the record).

As the record does not establish the correctness of any of these subsidiary factual conclusions, were the Court to take this case, it would have to evaluate the underlying evidence and determine whether the factual findings made below were erroneous. In such a circumstance, denial of the writ is appropriate under the standards set forth in Sup. Ct. R. 10.

F. The Court of Appeals' Decision Does Not Conflict with the *Ahlers* Decision and Could Not Conflict with Any Resolution of *Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 126 F.3d 955 (7th Cir. 1997), *cert. granted*, 118 S. Ct. 1674 (May 4, 1998), Now Before the Court.

Compliance with the absolute priority rule only needs to occur when the proposed plan does not satisfy

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[2] Before the court of appeals, Petitioners stated "[w]hile the Members are voting creditors and equity holders, their primary importance to any plan is as continued customers and purchasers of the power generated by the acquired assets." Pet. Appellee Brief at 3.

the requirement under § 1129(a)(8) that each impaired class of claims or interests has accepted the plan. When a bankruptcy court finds the § 1129(a)(8) requirement is met, as recently done by the bankruptcy court with regard to the Joint Plan, then as a matter of law the absolute priority rule is not at issue.

Even if the absolute priority rule were to be addressed with respect to the Joint Plan, the payment at issue does not present any issue with regard to the application of the rule. Neither the *Ahlers* decision nor any decision this Court may make in *Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 126 F.3d 955 (7th Cir. 1997), *cert. granted*, 118 S. Ct. 1674 (May 4, 1998), with regard to the existence of the "new value" exception to the absolute priority rule, has any relevance.

Indeed, the inapplicability of the absolute priority rule is established by the holding made and affirmed below that the payments are within the ambit of § 1129(a)(4). Section 1129 of the Bankruptcy Code sets forth numerous requirements for confirmation of a proposed plan of reorganization. One such requirement, set forth in § 1129(a)(4), deals with payments made or to be made for services or costs rendered in connection with the bankruptcy case or the plan of reorganization. A separate section, § 1129(b)(2) (which codifies the absolute priority rule), allows for confirmation over rejection by a class of claims and, thus, deals with payments received under the plan on account of claims or equity interests.

The criteria used to determine whether the plan may be confirmed differ for the two types of payments. Payments made for services rendered are subject only to the

requirement that the bankruptcy court approve them as reasonable. On the other hand, payments under a plan made on account of claims or equity interests are not subject to any requirement that they be approved as reasonable. Rather, the criteria of § 1129(b)(2) address whether holders of unsecured claims in senior classes either accepted the plan or will receive distributions of a value equal to their allowed claims.

The presence of these separate provisions in § 1129 dealing with different types of payments and imposing different criteria necessarily establishes that a finding that a payment was for services in connection with a plan precludes that payment from being one on account of a claim or equity interest subject to scrutiny under § 1129(b)(2).

CONCLUSION

For the reasons set forth above, the Petition should be denied.

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(3)

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No. 98-1206

In the Supreme Court of the United States

OCTOBER TERM, 1998

RALPH R. MABEY, CHAPTER II TRUSTEE FOR CAJUN ELECTRIC POWER COOPERATIVE, INC., ET AL., PETITIONERS

v.

SOUTHWESTERN ELECTRIC POWER COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15pp

QUESTION PRESENTED

Whether the court of appeals erred in holding that certain payments made by a plan proponent in a Chapter 11 (11 U.S.C. 1101 *et seq.*) bankruptcy proceeding to the debtor's cooperative members did not warrant disgorgement or disqualification of the proponent's plan.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 150 F.3d 503. The opinions of the district court (Pet. App. 40a-79a) and of the bankruptcy court (Pet. App. 82a-89a) are unreported.

JURISDICTION

The court of appeals entered its judgment and issued its mandate on August 11, 1998 (Pet. App. 1a, 36a). Petitions for rehearing, which the court of appeals circulated to the full court and which were treated as "motions to recall the mandate in order to restore jurisdiction to the Court of Appeals to enable the court to consider such Petitions," were denied on October 29,

1998 (Pet. App. 90a-91a). The petition for a writ of certiorari was filed on January 27, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

STATEMENT

1. Cajun Electric Power Cooperative (Cajun) is a non-profit, rural electrical generation and transmission cooperative. Cajun's twelve distribution cooperative members/owners provide retail electrical service to customers residing in Louisiana. Pet. App. 2a. The Department of Agriculture's Rural Utilities Service provides financial assistance, in the form of loans and guarantees, to rural electric providers in order to bring electric power to parts of the country that are not adequately served by commercial utility companies. See Rural Electrification Act of 1936, 7 U.S.C. 901 *et seq.* The United States, through the Rural Utilities Service, has provided Cajun billions in loans and guarantees. See Pet. 5.

In 1994, Cajun filed for bankruptcy, seeking reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et seq.* The United States, which is owed approximately $4.2 billion, is the largest of Cajun's 700 creditors. Pet. 5; Pet. App. 2a. Cajun's primary source of revenue—and thus the bankruptcy estate's most

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[1] Respondents Southwestern Electric Power Company and the Committee of Certain Members of Cajun Electric Power Cooperative argue (Br. in Opp. 9-10) that the court of appeals' immediate issuance of the mandate rendered the petitions for rehearing ineffective to toll the time for filing the petition for a writ of certiorari and thus that the petition is untimely. We disagree. The court of appeals allowed the petitions for rehearing to be filed and circulated and considered them on their merits, rather than dismissing them outright. The time for filing a petition for a writ of certiorari thus ran from the denial of the petitions. See *Bowman* v. *Loperena*, 311 U.S. 262, 266 (1940).

valuable asset—is its sale of wholesale electric power to its members, pursuant to long-term, all-requirements contracts. Pet. 5.[2]

The bankruptcy court appointed petitioner Ralph R. Mabey trustee to manage Cajun's affairs during the reorganization process. Pet. App. 2a; *In re Cajun Elec. Power Coop., Inc.*, 74 F.3d 599, 600 (5th Cir.), cert. denied, 519 U.S. 808 (1996). The trustee sought, and the bankruptcy court authorized, a competitive auction for Cajun, which produced three reorganization bids: (1) the Trustee plan, which proposed a purchase of Cajun's assets by Louisiana Generating LLC; (2) a plan proposed by respondents Southwestern Electric Power Company (Southwestern) and the Committee of Certain Members (Committee), which was an unofficial committee comprised of seven of Cajun's member cooperatives; and (3) a plan submitted by Enron Capital & Trade Resources Corporation and the Official Committee of Unsecured Creditors. Pet. App. 3a, 7a. Disclosure statements for those plans were approved in November 1996, and voting was concluded by December 6, 1996. See *id.* at 6a-7a.[3]

When confirmation hearings began before the bankruptcy court, three of the original Committee members withdrew their support for Southwestern's plan and stated that they wished to change their votes to support the Trustee's plan. Pet. App. 7a. On January 7, 1997, the bankruptcy court disqualified Southwestern's

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[2] Cajun's nuclear assets were disposed of through a separate settlement. See *In re Cajun Elec. Power Coop., Inc.*, 119 F.3d 349 (5th Cir. 1997).

[3] The plan proposed by Enron Capital & Trade Resources Corporation was withdrawn following the court of appeals' ruling in this case. Pet. 7.

counsel due to a conflict of interest. *Ibid.* That evening, Southwestern offered to pay Committee members who had not yet expressed a desire to change their votes the sum of $1 million, with $500,000 payable immediately and the balance payable in approximately one month. *Id.* at 7a-8a. Southwestern characterized the payments as compensation for the transition costs associated with the change of counsel and other processing of the bankruptcy litigation. *Id.* at 8a. The payments were denominated "confidential" (Pet. 7) and were not disclosed to the bankruptcy court or the parties to the proceeding either prior to or at the time of payment (Pet. App. 60a, 87a). Only after the payments were inadvertently disclosed three months later was notice provided. *Id.* at 11a.

2. a. When the payments were discovered, the United States and the Trustee (and other creditors) argued to the bankruptcy court that the payments to the Committee members were improper and should be disgorged because such payments could be made only as part of a confirmed plan of reorganization. See Pet. App. 84a-85a. After conducting a hearing, the bankruptcy court found that the payments "would, in some way, further [Southwestern's] chances of success" in having its reorganization proposal adopted. *Id.* at 86a. The bankruptcy court nevertheless ruled that the payments were permissible "transition assistance." *Id.* at 89a. The bankruptcy court further found that the payments were not conditioned on the Committee members' adherence to a separate agreement to enter into power supply contracts exclusively with Southwestern pending the adoption of a reorganization plan, nor were they intended to buy the Committee members' votes. *Id.* at 86a, 88a. Rather, the court con-

cluded that Southwestern obtained "nothing" in return for its payment of $1 million. *Id.* at 86a.

The court ruled, however, that the payments required its approval under 11 U.S.C. 1129(a)(4).[4] Accordingly, the bankruptcy court ordered Southwestern to file an application for nunc pro tunc approval of the payments. Pet. App. 17a. Southwestern did so, and that application remains pending before the bankruptcy court. See *id.* at 17a, 30a.

b. The district court reversed and referred the matter to the United States Attorney for investigation of possible criminal conduct. Pet. App. 49–74a, 78a-79a.[5] The district court held that the payments by Southwestern to the Committee members were not adequately disclosed and, in fact, were deliberately concealed. *Id.* at 60a, 63a. The court also noted that the payments to the Committee members "coincidentally c[ame] to approximately the amount of money that they had as creditors in this particular case." *Id.* at 69a. In the district court's view, Southwestern was "paying [the Committee members] off in return for their vote." *Id.* at 62a. The district court ordered the payments disgorged and returned to Southwestern, rather than

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[4] That Section provides that a court shall not confirm a Chapter 11 plan of reorganization unless

> [a]ny payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

11 U.S.C. 1129(a)(4).

[5] The investigation by the United States Attorney's Office is currently inactive.

paid into the bankruptcy estate. *Id.* at 74a. The court also ruled that the improper payments rendered Southwestern's proposed reorganization plan unconfirmable as a matter of law. *Id.* at 73a-74a.[6]

3. The court of appeals reversed. Pet. App. 1a-36a. The court agreed with the bankruptcy court and the district court that payments such as those made by Southwestern must be approved as reasonable under 11 U.S.C. 1129(a)(4). Pet. App. 22a. But the court rejected the district court's conclusion that the payments were improper because they were not approved in advance, holding that the "plain language" of Section 1129 permits retroactive approval. *Ibid.* The court also reversed the district court's determination that the payments were made for an improper purpose, because the bankruptcy court's factual findings that the payments were not for the purpose of buying the members' votes or for locking the members into power supply agreements with Southwestern were deemed to be not clearly erroneous. *Id.* at 25a-29a. The court further held that the bankruptcy court did not abuse its discretion in determining that the payments were adequately disclosed, *id.* at 31a-32a, or clearly err in holding that the payments were made in good faith, *id.* at 35a. Finally, the court of appeals ruled that the payments did not violate the absolute priority rule, 11 U.S.C. 1129(b)(2)(B)(ii), or unfairly discriminate between class members, 11 U.S.C. 1123(a)(4), because the payments

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[6] The district court held that the payments violated numerous statutory provisions, including 11 U.S.C. 1123(a)(4) (discriminatory treatment of creditors), 1125 (disclosure requirements), 1129(a)(3) (improper purpose and bad faith), 1129(a)(4) (failure to obtain prior judicial approval), and 1129(b)(2)(B)(ii) (absolute priority rule). See Pet. App. 18a.

were not derived from assets of the bankruptcy estate. The court accordingly held that Southwestern's plan was not disqualified from confirmation as a matter of law and that the district court erred in ordering disgorgement. Pet. App. 36a.

ARGUMENT

Petitioners seek (Pet. 8-16) this Court's review of the court of appeals' determination that Southwestern's undisclosed payments to certain of Cajun's cooperative members were not legally improper. The United States, which is owed $4.2 billion, is by far the largest creditor in the underlying bankruptcy proceeding. See Pet. 5. As a general matter, the United States shares petitioners' concerns about the secretive payments that Southwestern made only to certain bankruptcy creditors who also happened to be the gatekeepers to Cajun's primary asset (the all-requirements power contracts), and that were made in the wake of the efforts by three other cooperative members to abandon their votes in support of Southwestern's plan. In particular, we agree with petitioners that, at a minimum, it is not conducive to the proper functioning of the bankruptcy process for plan proponents to make payments to interested stakeholders—especially payments that "coincidentally come[] to approximately the amount of money that [the stakeholders] had as creditors in th[e] particular case" (Pet. App. 69a)—that are not properly disclosed to all parties in a timely fashion in accordance with applicable bankruptcy procedures. See, *e.g.*, 11 U.S.C. 1125 (disclosure requirements). For those reasons, the United States, like petitioners, sought rehearing below. While the United States thus disagrees with the court of appeals' ruling, we nevertheless do not

believe that the case merits an exercise of this Court's certiorari jurisdiction for five reasons.

First, the decision does not conflict with the ruling of any other circuit, and petitioners do not seek this Court's review on that basis.[7]

Second, the court of appeals' ruling does not squarely conflict with any decision of this Court. Petitioners are correct (Pet. 9-13) that the court's ruling is in tension with the principles underlying this Court's decision in *United States* v. *Knight*, 336 U.S. 505 (1949). In that case, counsel for a creditor seeking to acquire the debtor's assets made an undisclosed payment of $3000 to the bankruptcy trustee and his attorney while reorganization proceedings were pending. When the payment came to light, it was defended, like Southwestern's payment here, on the ground that it represented services properly rendered in connection with the reorganization. 336 U.S. at 506-507. This Court sustained the convictions for bankruptcy fraud on the

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[7] Petitioners present a third question they wish to argue, in the event the petition is granted, that concerns the consistency of the court of appeals' ruling with the Fourth Circuit's decision in *Official Comm. of Equity Security Holders* v. *Mabey*, 832 F.2d 299 (1987), cert. denied, 485 U.S. 962 (1988). See Pet. i. Petitioners do not, however, claim that the court of appeals' ruling conflicts with that decision. Nor could they. The Fourth Circuit's case concerned the pre-plan distribution by the debtor of what were indisputably assets of the bankruptcy estate to one class of creditors outside the Bankruptcy Code's established priority system. 832 F.2d at 301-302. The question presented in the present case, however, is whether Southwestern's secret payment should have been considered part of the bankruptcy estate in the first instance. The court of appeals here did not question the applicability of the Bankruptcy Code's payment scheme to all assets found to be part of the bankruptcy estate. It simply concluded that the $1 million payment did not fall into that category.

ground that the record permitted a jury to find that the $3000 "was paid in connection with the reorganization," "was paid secretly and in a devious way," and that "the form of the arrangement served only to syphon [funds to the trustee] without court approval." *Id.* at 508. This Court explained:

> All the consideration which is paid for a bankrupt's assets becomes part of the estate. No device or arrangement, however subtle, can subtract or divert any of it. It is the substance of the transaction, not its form, which controls. If that requirement were not rigidly enforced, control of the plan of reorganization * * * would pass from the court to the parties. That would subvert the statutory scheme.

Ibid.

The court of appeals' decision does not squarely conflict with *Knight*. The court of appeals' decision turned upon the factual findings made by the bankruptcy court that (1) the payments came after the members had already voted and thus could not have been for the purpose of buying those votes; (2) the members' votes were not worth buying; (3) the payments were not in exchange for the members' agreement to enter into all-requirements power contracts with Southwestern; and (4) the payments were animated by Southwestern's benign purpose of providing transition assistance following the disqualification of the Committee's bankruptcy counsel. See Pet. App. 25a-29a. While the United States largely disagrees with those factual findings and the inferences that were drawn from them, we recognize that this Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220,

227 (1925). The findings made by the bankruptcy court and accepted by the court of appeals do not correspond to the factual predicate that underlay this Court's ruling in *Knight*. See 336 U.S. 508 (noting that court of appeals' reversal of conviction was "an improper interference with the jury's function" to find the facts surrounding the secretive payment made in that case). Accordingly, no square conflict is presented and this Court's review is not warranted.

Third, we disagree with petitioners' claim (Pet. 13-15) that the court of appeals' decision is inconsistent with this Court's decision in *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197 (1988). In *Ahlers*, this Court addressed the absolute priority rule, 11 U.S.C. 1129(b)(2)(B)(ii), which regulates the allocation of bankruptcy assets when a plan is confirmed over the dissent of an impaired creditor class (a "cramdown plan"). See 485 U.S. at 202. The *Ahlers* Court held that new value contributed in the form of sweat equity, as opposed to money or capital, provides no basis for an exception to the absolute priority rule. *Id.* at 202-209. The present case, however, does not involve any contribution of sweat equity by Southwestern; nor does it involve the confirmation of a cramdown plan. To the contrary, the bankruptcy court has refused to confirm any plan yet in this bankruptcy proceeding, having recently disqualified both petitioners' and Southwestern's proposed plans on other grounds. See *In re Cajun Elec. Power Coop., Inc.*, 230 B.R. 715 (Bankr. M.D. La. 1999); see also Southwestern Br. in Opp. 9.

Nor, contrary to petitioners' claim (Pet. 14-15), does this case overlap in any significant respect with *Bank of America National Trust & Savings Ass'n* v. *203 North LaSalle Street Partnership*, No. 97-1418 (argued Nov. 2, 1998), which is currently pending before this Court.

That case concerns the existence of a new value exception to the absolute priority rule. Because this case does not involve the contribution of new value by junior equity holders under a proposed reorganization plan (as petitioners concede, Pet. 15); does not at this juncture entail review of a plan that has been confirmed by the bankruptcy court (because no plan has yet been confirmed); and, in the view of the bankruptcy judge and the court of appeals, does not concern the distribution of money that was part of the bankruptcy estate, it is highly unlikely that this Court's decision in *Bank of America* could have any material effect on the court of appeals' disposition of this case.

Fourth, and relatedly, the court of appeals' ruling reflects a highly fact-bound and record-specific determination about the character of these particular undisclosed, pre-confirmation payments, in light of their timing and the nature of the recipients' interests. The court of appeals did not hold that other analogous payments made under somewhat different factual circumstances could not be found by a bankruptcy court to be improper under the principles enunciated in *Knight*. Because the court of appeals' decision turns upon the deferential standard of review accorded the bankruptcy court's factual findings and does not announce any broad new exception to traditional rules governing undisclosed payments to interest holders in bankruptcy proceedings, this Court's review is not warranted.

Fifth, the interlocutory character of this proceeding counsels against review at this time. Still pending before the bankruptcy court is Southwestern's application for approval of the payments it made. See Pet. App. 17a, 30a. Should the bankruptcy court ultimately decline to approve the payments at issue here, either in whole or in part, on the ground that the payments were

not "reasonable" within the meaning of 11 U.S.C. 1129(a)(4), the questions presented in the petition would be rendered practically, if not legally, moot.

Furthermore, as previously noted, the bankruptcy court recently issued a new and important series of rulings in the underlying litigation. See *In re Cajun Elec. Power Coop., Inc., supra.* Those rulings held, in pertinent part, that neither of the proposed reorganization plans that were then pending before the court (including the Southwestern plan) was confirmable under applicable provisions of the bankruptcy law, for a variety of reasons wholly independent of the question presented by petitioners. See *ibid.*[8] Two new plans of reorganization were recently submitted for the bankruptcy court's approval. The fact that the proceedings below remain in flux further militates against review by this Court at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Certain aspects of the bankruptcy court's rulings have been appealed to the district court by the United States and other parties to the bankruptcy litigation.

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No. 98-1206

IN THE

Supreme Court of the United States

RALPH R. MABEY, Chapter 11 Trustee for Cajun Electric Power Cooperative, Inc., AMERICAN COMMERCIAL TERMINALS LLC, WESTERN FUELS ASSOCIATION, INC. and TRITON COAL COMPANY LLC,

Petitioners,

vs.

SOUTHWESTERN ELECTRIC POWER COMPANY and THE COMMITTEE OF CERTAIN MEMBERS OF CAJUN ELECTRIC POWER COOPERATIVE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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FURTHER REASONS FOR GRANTING THE WRIT

I.

RESPONDENTS' PROCEDURAL OBJECTIONS ARE WITHOUT MERIT.

A. The Petition was Timely.

Unless the time is altered by local rule or order, petitions for rehearing in the court of appeals must be filed within 14 days after the date of entry of judgment. Fed. R. App. P. 40(a)(1). The court of appeals' judgment was entered on August 11, 1998. The petition for rehearing was filed on August 25, 1998. The petition was timely.[1]

In arguing that Petitioners were late, Respondents confuse "mandate" with "judgment," and Fed. R. App. P. 40 with 41. No rule or order shortened the time to file a petition for rehearing in this case. Even though the mandate issued "forthwith," the time to petition for rehearing remained the same. *United States v. DiLapi*, 651 F.2d 140, 144 and n.2 (2nd Cir. 1981), *cert. denied sub nom*, 455 U.S. 938 (1982).

The court of appeals' ultimate treatment of the petition for rehearing as one to recall the mandate does not change this result. *Id.* Issuance of the mandate only allowed the courts below to proceed with the case; it did not truncate Petitioners' right to seek certiorari.

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1. The United States timely filed motions for rehearing and suggestions for rehearing en banc on September 25, 1998, within the 45 day period allowed the government.

B. Petitioners Raised the Absolute Priority Rule Below.

Respondents falsely claim that Petitioners raised the absolute priority rule "for the first time before any court" in their petition for rehearing.[2] (Respondents' Opp. at 9.) As the court of appeals noted, Petitioners asserted in the bankruptcy court that the SWEPCO Payment violated the " 'Bankruptcy Code's provision respecting the rights of secured creditors and the priority of payments to creditors established by the Code.' " (App. A at 14a.) Although the bankruptcy court failed to rule on the absolute priority issue, the district court did so rule (App. C at 49a-50a, 57a), as did the court of appeals.

If Respondents are complaining that Petitioners raised this specific absolute priority argument first in the petition for rehearing and now before this Court, Petitioners could not have known until the court of appeals ruled that it would find that the funds at issue were not paid "on account of" the members' claims. That ruling was never made by the bankruptcy court, and *a fortiori* by the district court, which reversed the bankruptcy court's decision.

II.

THIS COURT'S *LASALLE* DECISION REJECTED THE READING OF "ON ACCOUNT OF" ADOPTED BY THE COURT OF APPEALS BELOW.

We no longer need guess whether the Court's decision in *Bank of Am. Nat'l. Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 1999 U.S. LEXIS 3003 (May 3, 1999) could affect the resolution of the matters at bar, because the Court has now decided *LaSalle*. Therein, the Court read the phrase

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2. Respondents made this same argument before the district court. Petitioners carefully showed the district court and Respondents where in the record the arguments were raised before the bankruptcy court.

" 'on account of' " as meaning " 'because of[,]' " not " 'in exchange for' " or " 'in satisfaction of.' " *Id.* at *31. Thus, "a causal relationship between holding the prior claim or interest and receiving or retaining property is what activates the rule." *Id.* at *31.

In its reading of the absolute priority rule, the court of appeals below applied the discredited meaning "in satisfaction of" to the phrase "on account of."[3] The court of appeals reached this result in two steps. First, it ruled that the SWEPCO payments to members did not violate 11 U.S.C. § 1123(a)(4), which forbids disparate treatment of similarly situated creditors, because "the payments were made not in satisfaction of the CCM members' claims against Cajun, but rather as reimbursement for plan and litigation expenses incurred in the bankruptcy case." (App. at 33a.) The court of appeals then stated that for the same reason, *viz.*, the funds were not paid in satisfaction of the members' claim, the funds ***also*** were not paid " 'on account of [the CCM members'] [unsecured] claim[s] or [their equity] interest[s].' " 11 U.S.C. § 1129(b)(2)(B)(ii). (App. A at 34a.)

Thus, the effect of the court of appeals' absolute priority ruling is that a bidder for estate assets may pay whatever it wants to equity, creditors or other stakeholders, provided only that payment is not characterized as a payment in satisfaction of claims or interests.[4] This ruling is based on a discredited interpretation of the meaning of "on account of" and is thus inconsistent with the Court's opinion in *LaSalle*.

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3. Indeed, the *LaSalle* Respondent cited the court of appeals' decision below, urging that the decision "support[ed] Respondent's argument . . . that 'on account of' in 11 U.S.C. § 1129(b)(2)(B)(ii) means 'in satisfaction of.' " Supplemental Brief of Respondent, 1997 U.S. Briefs 1418, *1 (October 15, 1998).

4. The SWEPCO Respondents argument that if 11 U.S.C. § 1129(a)(4) applies, it preempts the application of 11 U.S.C.

(Cont'd)

Both the SWEPCO Respondents and the United States misapprehend petitioners' arguments concerning the "absolute priority rule." This is not a "new value" case. Indeed, the essence of this case is that the members, who are the equity in this case, received $1 million ahead of senior creditors, "on account of" or "because of" their status as equity, for ***no*** value.[5]

Finally, both SWEPCO Respondents and the United States inaccurately frame the procedural posture of this case. The SWEPCO Respondents have now proposed a new plan of reorganization, under which these very same absolute priority issues arise. Although the voting has not yet occurred on this plan, it is virtually certain that the classes of unsecured

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(Cont'd)

§ 1129(b) (Respondents' Opp. at 19), is not supported by the plain reading of the statute. If payments of "costs and expenses" under § 1129(a)(4) were exempted from § 1129(b)(2)(B)(ii), then the statute would clearly say so by referencing payments under § 1129(a)(4) as an exception. The statute provides, however, for **no** exceptions. A consistent reading of the statute leads to the conclusion, rather, that a payment may fit under both §§ 1129(a)(4) and (b)(2)(B)(ii) by allowing the retention or receipt of property (including payment of costs and expenses) by junior creditors or equity only in compliance with the absolute priority rule, and, if such property is in the form of costs and expenses, by allowing its retention or receipt only in the amount that is also determined to be "reasonable."

5. The United States' opposition reveals a misunderstanding of the issues and a lack of attention to detail. The United States claims that SWEPCO's counsel was disqualified for a conflict of interest. (U.S. Opp. at 3-4.) It was the members' counsel, not SWEPCO's counsel, who suffered disqualification. Similarly, against application of the "absolute priority rule," the government argues that "the present case does not involve any contribution of sweat equity by Southwestern. . . ." (U.S. Opp. at 10.) Southwestern is not the equity here. It is a bidder. The members are the equity who received payment ahead of senior creditors.

creditors will reject the plan because the Unsecured Creditors Committee has stated that it will recommend an unsecured creditor vote against the plan, and because SWEPCO projects that distributions to unsecured creditors under the new SWEPCO plan will be 3% to 16.5% of creditors' claims while the competing new plan of the Trustee will pay unsecured creditors in full with interest or in accordance with settlements reached.[6] Thus, the $1 Million Payment and the absolute priority rule issues it raises remain critical considerations in the ultimate resolution of this case.

If the Court is not inclined to grant certiorari to decide this case, Petitioners respectfully submit that the Court should grant certiorari, vacate the court of appeals' decision, and remand for consideration in view of *LaSalle*.

III.

THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH *KNIGHT*.

The United States argues that the court of appeals' decision is merely "in tension with the principles underlying this Court's decision in *United States v. Knight*, 336 U.S.

6. Certain statements in the SWEPCO Respondents' brief about the Trustee's prior plan of reorganization require correction. The Trustee's prior plan did not try to bind the members "without their consent to new contracts." (Respondents' Opp. at 2.) The Trustee's Plan tried to assume the existing all-requirements contracts of the members under 11 U.S.C. § 365. Further, contrary to SWEPCO Respondents' implications (Respondents' Opp. at 9), the bankruptcy court never found that the Trustee's prior plan was not proposed in good faith. Rather, confirmation was denied based on the bankruptcy court's conclusion that the proposed assumption of the all-requirements contracts violated Louisiana cooperative law, and, based solely on this conclusion, the bankruptcy court found that the plan was proposed by a "means forbidden by law" under 11 U.S.C. § 1129(a)(3).

505 (1949)." (U.S. Opp. at 8-9.) Direct conflict, not "tension," is at issue here.

The United States notes: "The court of appeals here did not question the applicability of the Bankruptcy Code's payment scheme to all assets found to be part of the bankruptcy estate. It simply concluded that the $1 million payment did not fall into that category." (U.S. Opp. at 8, n.7.) And therein lies the rub. Under *Knight*, "[a]ll the consideration which is paid for a bankrupt's assets becomes part of the estate. No device or arrangement, however subtle, can subtract or divert any of it." 336 U.S. at 508. It begs the question to say that this case is distinguishable from *Knight* because the funds did not belong to the estate in the first place.[7] In fact, contrary to *Knight*, the court of appeal's decision sanctioned a "device or arrangement" to divert "consideration which is paid for a bankrupt's assets" from the estate.

Further, contrary to the suggestions of both the SWEPCO Respondents (Respondents' Opp. at 13) and of the United States (U.S. Opp. at 10), whether the payments were made with a "benign" motive or a malevolent intent is irrelevant under *Knight*. The facts relied on to distinguish *Knight* (which go to motive and purpose) (Respondents' Opp. at 13-14; U.S. Opp. at 9) are immaterial to the central issue decided in *Knight* raised here: When a bidder makes payments in connection with its bid for estate assets to a crucial stakeholder in the case instead of to the estate, are the funds

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7. For the same reason, the United States' efforts to distinguish *In re A. H. Robins Co.*, 832 F.2d 299 (1987), *cert. denied*, 485 U.S. 962 (1988), are unavailing. Only if it is assumed, contrary to the express holding of *Knight*, that these payments by a bidder are not property of the estate can SWEPCO's payment be reconciled with the prohibited payments in *Robins*.

paid directly by the bidder to the stakeholder still considered property of the estate?[8]

The SWEPCO Respondents admit that the bankruptcy court found that the SWEPCO witness had "testified that the payment was made to assist the members in their ongoing struggle for confirmation of the SWEPCO and Members plan" (Respondents' Opp. at 4), the plan which incorporated the SWEPCO bid. Thus, the SWEPCO Respondents admit that the payment was made in connection with and to further the SWEPCO bid.

The United States concedes that it "shares petitioners' concerns about the secretive payments that Southwestern made only to certain bankruptcy creditors who also happened to be the gatekeepers to Cajun's primary assets (the all-requirements power contracts)." (U.S. Opp. at 7.) It, too, admits the crucial facts needed for the application of *Knight*: payments by a bidder to creditors who are "gatekeepers to Cajun's primary asset." *Id.*

IV.

NO REVIEW OF FACTUAL FINDINGS IS SOUGHT.

Both the SWEPCO Respondents and the United States erroneously argue that Petitioners seek review of factual findings of the lower courts. Although disagreeing with certain findings in this case, Petitioners seek certiorari solely on two discrete legal issues (the absolute priority rule and the property of the estate issues) that were wrongly decided

8. That *Knight* was a criminal case does not distinguish it because the issue of whether a payment made directly from a bidder to a stakeholder in the case is property of the estate is a question of bankruptcy law, not criminal law. The fact that this bankruptcy law question arose in consideration of a criminal conviction does not lessen its precedential effect.

by the lower court, irrespective of the facts found. Further, although SWEPCO Respondents attempt to cloud the issues by alleging the relevance of "specific factual circumstances" in this "unique" case (Respondents' Opp. at 16), none of the cited facts is relevant to the discrete legal issues raised by Petitioners. There are no special rules that apply to cooperatives in bankruptcy, nor does the status of "plan proponent" (which under 11 U.S.C. § 1121 can be any "party in interest") afford any special rights or exceptions to the rules.[9]

CONCLUSION

As the United States candidly admits, "it is not conducive to the proper functioning of the bankruptcy process for plan proponents to make payments to interested stakeholders." (U.S. Opp. at 7-8.) Yet, such payments were made in this case which were inimical to the "proper functioning of the bankruptcy process." This case is about proper control of the bankruptcy process through parties' adherence to prior rulings of this Court. It is about preventing equity holders from using their leverage to receive property ahead of creditors. The writ of certiorari should be granted.

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9. Indeed, if the rule were otherwise, bidders could solicit favored creditors or equity holders as co-plan proponents in order to circumvent the Bankruptcy Code's distribution scheme.

Respectfully submitted,

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